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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

CRISTA RAMOS, individually and )  
on behalf of others similarly )  
situated, )

Plaintiffs, )

VS. )

NO. C 18-01554 EMC

Kirstjen Nielsen, in her )  
official capacity as Secretary )  
of Homeland Security; et al., )

Defendants. )  
\_\_\_\_\_ )

San Francisco, California

Tuesday, September 25, 2018

**TRANSCRIPT OF PROCEEDINGS**

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**BY: ADAM KIRSCHNER, TRIAL ATTORNEY**

Tuesday - September 25, 2018

10:33 a.m.

P R O C E E D I N G S

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**THE CLERK:** Calling Civil Action 18-1554, Ramos, et al., versus Nielsen, et al.

Counsel, please approach the podium and state your appearances for the record.

**MR. KIRSCHNER:** Adam Kirschner for defendants.

**THE COURT:** All right. Good morning, Mr. Kirschner.

**MR. KIRSCHNER:** Good morning.

**MR. ARULANANTHAM:** Good morning, Your Honor. Ahilan Arulanantham for the plaintiffs.

**THE COURT:** All right. Thank you. Good morning, Mr. Arulanantham.

**MS. MACLEAN:** Good morning, Your Honor. Emilou MacLean for the plaintiffs.

**THE COURT:** All right. Thank you.

**MR. ARULANANTHAM:** Your Honor, the slides that I think we discussed with the Court in advance, we've given copies to the government and to the court reporter, and we have some here for Your Honor as well if you'd like.

**THE COURT:** All right. Thank you.

Now, what would you like to do? My general practice is to ask questions that I have. I don't generally do presentations unless -- in certain cases I do. So is it your intent to use

1 these sort of selectively, or do you have a plan to sort of  
2 make a formal presentation going through all these slides?

3 **MR. ARULANANTHAM:** No. We'll use them selectively,  
4 and you should certainly ask questions anytime you feel you  
5 want, and we will refer to them just interspersed throughout  
6 our arguments as we proceed.

7 **THE COURT:** All right. So you will show them as  
8 needed?

9 **MR. ARULANANTHAM:** Yes, Your Honor.

10 **THE COURT:** And I assume you have good knowledge and  
11 access to know when these might be handy in terms of any  
12 response?

13 **MR. ARULANANTHAM:** Exactly, Your Honor.

14 **THE COURT:** All right. Good.

15 And does the government have any slides or anything you'd  
16 like to --

17 **MR. KIRSCHNER:** No, Your Honor.

18 **THE COURT:** All right.

19 First, let me ask -- I think the first thing that we have  
20 to address on a motion for preliminary injunction is a balance  
21 of hardships and the question of irreparable injury because if  
22 there is a finding of irreparable injury and a potential  
23 irreparable injury to the plaintiffs if the injunction is  
24 denied and if the balance of hardships tips sharply in favor,  
25 for instance, of the TPS beneficiaries, then the showing in

1 terms of the merits are affected. Rather than having to show a  
2 likelihood of prevailing, the plaintiffs need only show serious  
3 questions raised on the merits.

4 On the other hand, if the balance of hardships does not  
5 tip sharply in their favor, then a more robust showing on the  
6 merits is needed.

7 So there obviously, at least in this circuit, is a sliding  
8 scale. So it makes sense to address the preliminary  
9 injunction -- I mean, the balance of hardships issue, and so I  
10 have a couple questions in that regard.

11 There were no -- obviously no counteraffidavits to the  
12 declarations of the plaintiffs, various plaintiffs, about their  
13 actual situation and the kind of hardships that would befall  
14 them if the TPS terminations were to go forward without an  
15 injunction.

16 The government's argument seems to be more of a legal  
17 argument about the nature of their interests and the fact that  
18 the harm that they are facing is sort of inherent in the  
19 temporary nature of the program. Is there some factual -- any  
20 factual data that I should be aware of that would sort of  
21 counter the showing of hardship?

22 **MR. KIRSCHNER:** Well, Your Honor, you're correct. Our  
23 argument is primarily a legal argument. There are operational  
24 components that can be impacted on a preliminary injunction,  
25 but that's not what we're resting on. Our argument is, as we

1 laid out in our briefs, kind of the legal underpinning for both  
2 the government's equities and also a causal relationship  
3 vis-a-vis what plaintiffs have identified in their papers as  
4 well. So it's more of a legal argument than a factual  
5 argument.

6 **THE COURT:** And when you say "the causal  
7 relationship," what do you mean by "causal relationship"?

8 **MR. KIRSCHNER:** Well, the way I understand plaintiffs'  
9 argument is if there is an illegal reason to terminate TPS,  
10 then their hardships relate to that illegal decision and so  
11 it's premised on a decision on the merits.

12 So there -- we are not up here trying to put doubt on  
13 anything that's identified in plaintiffs' declarations by any  
14 means. That's not what we're trying to do. What we're  
15 addressing is the fact is that the inherent nature of TPS is  
16 the causal relationship to any harms that are identified unless  
17 the action itself was illegal, but that would be -- require a  
18 decision or an assessment of the likelihood of success on the  
19 merits.

20 And so what we believe is that this preliminary injunction  
21 motion wins or loses on the likelihood of success on the merits  
22 because the argument that plaintiffs are putting forth is  
23 premised on that question.

24 **THE COURT:** Well, that sort of creates a bit of an  
25 intellectual quandary. You're saying, well, if they are wrong

1 on the merits, they're not really suffering any harm. Only if  
2 they're right on the merits would they suffer any harm is  
3 essentially what you're saying.

4 **MR. KIRSCHNER:** Well, no, the harm would be flowing  
5 from the statute. The statute itself -- the temporary nature  
6 of the statute is kind of mixed up into the inherent nature of  
7 the statute and would be the proximate cause of any harm that  
8 they identify if the action is lawful.

9 **THE COURT:** Well, but technically what I'm supposed to  
10 look at is the harm, the practical harm, to one party -- the  
11 plaintiff typically -- if the preliminary injunction is denied  
12 versus the harm to the defendant if the preliminary injunction  
13 is granted. That balance is what then informs how deeply and  
14 what kind of a -- how robust the showing must be on the merits.

15 You're suggesting we look almost at the merits because if  
16 you win on the merits, they really are not suffering any  
17 cognizable harm is what you're saying.

18 **MR. KIRSCHNER:** From the decision at issue. And what  
19 I would say is that the harm, the legal harm, that we  
20 identified to the government is the Congress setting up a  
21 system that provides deference and discretion for the Secretary  
22 to make these difficult judgment calls and that assuming a  
23 world where this was a lawful decision, then that disrupts kind  
24 of the scheme established by Congress again premised on the  
25 question of the merits.

1           So our point is that the --

2           **THE COURT:** And that would be true with any  
3 preliminary injunction against any governmental action seeking  
4 to enforce some statute. Whether it's a congressional statute,  
5 a state statute, some municipal ordinance, the court would be  
6 upsetting the regulatory scheme enacted duly -- arguably duly  
7 enacted by the Legislature and the Executive. I mean, that's  
8 almost true for every public injunction is what you're saying.

9           **MR. KIRSCHNER:** This one's a little bit different  
10 because of such discretion given to the Secretary. The scene  
11 set up by Congress is an understanding more so than in other  
12 contexts of the deference given and how it's a balancing of the  
13 various factors in assessing something that Congress had  
14 precluded from judicial review for the ultimate decision.

15           And so this takes on a different nature than maybe just a  
16 run-of-the-mill arbitrary and capricious claim about some  
17 regulation.

18           **THE COURT:** Is there some concrete harm to the  
19 government if the temporary -- the status quo were continued  
20 until this case is adjudicated? In other words, is there any  
21 claim of threat to national security or economic harm that  
22 would befall the nation or some industry or -- other than the  
23 idea that Congress, especially in this area of immigration  
24 policy, and Executive should be able to carry out with the  
25 deference they normally do without interference from the



1 judiciary? Is there some concrete harm?

2 **MR. KIRSCHNER:** There is an operational harm of kind  
3 of starting and stopping employment authorization documents,  
4 trying to figure out how to carry that out, timing. It's the  
5 idea of the old analogy of turning around a battleship that the  
6 government uses all the time where operationally things are not  
7 as easy as a light switch when it involves the government.

8 But, again, I do want to emphasize that that's not really  
9 the main issue we're putting forth to you today. It's really  
10 the legal concept of the fact that the harms identified  
11 throughout -- on both sides of the briefs are kind of premised  
12 on this question of the merits.

13 And so our point is that this court -- we understand that  
14 the Ninth Circuit has a sliding scale, but this is the type of  
15 case which really does turn or fall on the likelihood of  
16 success on the merits.

17 **THE COURT:** All right. Let me ask you just a  
18 practical question on some statistics. I don't know if you  
19 know the answer to this.

20 We know the numbers of TPS beneficiaries from the four  
21 countries. El Salvador has over 263,000 people; Haiti almost  
22 59,000 people; fewer numbers, 5,000 or so for Nicaragua; and a  
23 little over 1,000 from Sudan.

24 Do we know -- do we have any idea what percentage or how  
25 many of these beneficiaries will be subject to deportation in

1 all likelihood upon termination of TPS status; i.e., they don't  
2 have any other documented status, that maybe some might apply  
3 for some form of relief? But just can we assume that absent  
4 some either asylum or something else, that nearly all these  
5 beneficiaries are going to be subject to removal?

6 **MR. KIRSCHNER:** Not -- not substantially all, no.

7 **THE COURT:** No?

8 **MR. KIRSCHNER:** You're not to assume that. What -- I  
9 don't have a specific statistic for you, but I do understand  
10 that for Sudan, the last I had heard, and this is a little -- a  
11 little dated, but that it was somewhere between 250 to 300  
12 individuals registered for TPS.

13 My understanding, and this is based on my understanding,  
14 is that the way it works is that if you had TPS when TPS was  
15 designated, then you're still eligible for TPS. And so the  
16 thousand number, I think it might be including individuals who  
17 might have adjusted status since they've been in the  
18 United States, and so the thousand number is kind of the outer  
19 limit. It's not the minimum.

20 Though, I will say that there are -- there certainly are  
21 some individuals, a large number of individuals, who might not  
22 have other legal status or other -- or other visas available.

23 **THE COURT:** What about for the larger numbers from,  
24 like, El Salvador and Haiti? Do we have any idea how many  
25 folks have adjusted status, what percentage, as opposed to

1 being vulnerable to removal?

2 **MR. KIRSCHNER:** Well, so I should say that that  
3 number -- there might be various reasons someone didn't  
4 register. Someone might have moved out of the country, and so  
5 that might have -- someone might have adjusted status; and  
6 someone might have not registered because maybe the reason for  
7 registering was for employment authorization purposes and  
8 decided not to register for whatever reason.

9 So I don't want to say that the number of 264 or 250 -- I  
10 have that number 264 in my mind -- is the end-all-be-all number  
11 for Sudan. I'm not quite sure. I don't have the statistics  
12 for the others, but I do think that there's, you know, a  
13 sizable percentage that falls into every camp of adjustment of  
14 status, maybe other visas, maybe left this country, and not  
15 having any other legal status as well.

16 So --

17 **THE COURT:** Does the government have any idea, just  
18 roughly, out of the 263 how many are likely to be facing  
19 removal proceedings? I mean, is it half? Is it 90 percent?  
20 20 percent?

21 **MR. KIRSCHNER:** I would assume, this is -- that most  
22 of the people who register for TPS do not have other avenues.  
23 TPS is not in lieu of other status. It's in addition to other  
24 status. But if others have other status, then they might not  
25 have --

1           **THE COURT:** They might have registered for TPS?

2           **MR. KIRSCHNER:** Yeah. Exactly.

3           **THE COURT:** And the 263- or 264,000 beneficiaries, is  
4 that the number of people who have registered?

5           **MR. KIRSCHNER:** That was my understanding. It is a  
6 little dated but that was my understanding for Sudan.

7           **THE COURT:** So it's a fair assumption that most of  
8 these folks would not have other adjusted status otherwise they  
9 wouldn't have registered for TPS?

10          **MR. KIRSCHNER:** I think it's a fair assumption that  
11 there's a considerable amount of those individuals.

12          **THE COURT:** Okay.

13          **MR. KIRSCHNER:** And we're not -- let me put it this  
14 way: We're not disputing the fact that there are individuals  
15 who do not have other status --

16          **THE COURT:** All right.

17          **MR. KIRSCHNER:** -- but we do say that there are  
18 individuals who do have other status.

19          **THE COURT:** And do we know what percent of, let's say  
20 from El Salvador, of the 263 are children?

21          **MR. KIRSCHNER:** I don't have those numbers,  
22 Your Honor, available to me today.

23          **THE COURT:** Did the government in making its decision  
24 have those numbers?

25          **MR. KIRSCHNER:** Your Honor --

1           **THE COURT:** The Secretary.

2           **MR. KIRSCHNER:** -- there may be some numbers in the  
3 record. I just don't have them off the top of my head.

4           I do know that that's one of plaintiffs' claims, is  
5 whether that was taken into account. There was some general  
6 statements about the impact on children, the humanitarian  
7 impact. Secretary of State Rex Tillerson talks about that in  
8 his letter, not by number but by -- but talks about the --  
9 about taking into consideration the humanitarian impact; but  
10 said that, in the end of the day, from his perspective, his  
11 recommendation was based on how he interpreted the law of TPS  
12 and kind of looking at the impacts with whether those  
13 countries -- the conditions within those countries.

14           **THE COURT:** So I take it the government would not have  
15 the more specific number of how many are citizen children --  
16 how many citizen children would be affected or would it?

17           **MR. KIRSCHNER:** Not that I have today.

18           And I would say that -- I mean, just to -- for purposes of  
19 today, we are not disputing the fact that there will be  
20 individuals who have TPS who might be children nor are we  
21 disputing the fact of -- the fact that there would be U.S.-born  
22 children of TPS beneficiaries.

23           I will note that -- as I'm talking here today, is that I  
24 believe Nicaragua and El Salvador were not ever redesignated,  
25 and redesignation is very important to understand.

1 Redesignation kind of starts the clock over again of who's  
2 eligible for TPS. So you have to -- when you get designated  
3 for TPS, a country does, the individuals who are eligible are  
4 the individuals who are currently in the United States. It's  
5 set up for people in the United States already at the time of  
6 the designation.

7 And so Nicaragua and El Salvador were in 1999 or 2000, and  
8 so I do not believe they've ever been redesignated and that  
9 means that by definition everybody who was in the United States  
10 at that time would now be -- would be an adult.

11 **THE COURT:** So if there wasn't redesignation, then  
12 there wasn't a new group of people then being designated?

13 **MR. KIRSCHNER:** Correct.

14 **THE COURT:** These would have been families who were  
15 already here under the original designation?

16 **MR. KIRSCHNER:** Exactly.

17 **THE COURT:** And what about Haiti? Was there a  
18 redesignation?

19 **MR. KIRSCHNER:** The following year. So the original  
20 designation I believe was 2010 and then there was a  
21 redesignation in 2011.

22 And I believe -- and Sudan has been redesignated. And off  
23 the top of my head, I believe the last redesignation was 2013,  
24 though that's -- one thing to point out about the history of  
25 designations and redesignations and extensions, that's all in

1 our motion to dismiss briefing. We tried to lay out the  
2 history in our motion to dismiss briefing of the Federal  
3 Register notices filed for each of these countries.

4 **THE COURT:** Right.

5 And then let me ask about Sudan in particular. I think  
6 the initial -- some of the initial documents indicated that  
7 there were concerns about the safety, the conditions in Sudan  
8 being still insufficiently safe to return; and then that was  
9 refined at some point to say, "Well, certain parts of Sudan are  
10 now safe, certain parts are not so safe; and, therefore, the  
11 conditions to terminate TPS status have been met."

12 Is there some indication as to what regions and how much  
13 of the population in Sudan are in areas that DHS still  
14 considers not safe to return to?

15 **MR. KIRSCHNER:** Well, so in the Federal Register  
16 notice it refers to regions such as -- I think Darfur might  
17 have been one of the regions discussed. So the Federal  
18 Register notices themselves refer to the regions.

19 I will note that --

20 **THE COURT:** Do you have any idea of what percentage of  
21 the population is affected in those designated regions?

22 **MR. KIRSCHNER:** No, Your Honor, I don't.

23 What I do know is that the Federal Register notice talks  
24 about the ability of Sudan as a general matter of being able to  
25 provide for the safe return of its nationals given the

1 population involved and the remainder of the country.

2           **THE COURT:** The remainder of the country, but I guess  
3 it seems like it's an obvious question but, you know, you would  
4 think you would want to know what parts of the country and  
5 where the population centers are and how much of the population  
6 is still affected by areas acknowledged by DHS as not being  
7 safe.

8           And more to the point, if you're going to remove the  
9 Sudanese beneficiaries, would it make a difference which  
10 regions -- if you're going to start parceling up a country by  
11 regions that are safe and unsafe, wouldn't it matter before you  
12 deport somebody that their family is in a safe or an unsafe  
13 region? I mean, would that -- does that make any difference?

14           **MR. KIRSCHNER:** Well, I think that it's a question  
15 that the Federal Register notice discussed, is -- it kind of  
16 discussed it in two different ways. First, the question of  
17 whether the originating conditions no longer apply, and then  
18 whether there could be provided for a safe return of the  
19 nationals, and you're talking about the second component.

20           **THE COURT:** Yes.

21           **MR. KIRSCHNER:** And on that second component, what it  
22 made finding, as discussed in the Federal Register notice, is  
23 that the country as a whole could sufficiently provide for the  
24 return of up to 1,000 nationals if it was for all of the TPS  
25 beneficiaries.



1           **THE COURT:** But what if their family, their roots are  
2 in a region like in Darfur, in an area that is problematic? To  
3 say, "Well, okay, they can safely reside and they can go back  
4 to a country" but they're going to go back to a country where,  
5 you know, they're not from, a different part of the country  
6 where they don't have any roots or connections or cultural ties  
7 or whatever it is? I'm just wondering whether that was  
8 considered.

9           **MR. KIRSCHNER:** So what was -- what the Federal  
10 Register notice -- I just refer you to the Federal Register  
11 notice in terms of the explanation about what was considered  
12 for those regions.

13           **THE COURT:** All right. Do you have any reaction to  
14 the *amicus* brief filed by California and various other states  
15 that talk about the impact, not just to the beneficiaries but  
16 to the economy, with their estimate that 132 billion in cost to  
17 the GDP if all the beneficiaries were to be removed, a decline  
18 of over \$5 billion in Social Security and Medicare  
19 contributions that these folks are making paying into the  
20 system, and then hundreds of millions of turnover costs because  
21 a lot of these folks are working, involved, deeply entrenched  
22 in the economy? Does the government take issue with any of  
23 those estimates?

24           **MR. KIRSCHNER:** It is, again, a legal argument on the  
25 causation question that we discussed vis-a-vis the individual

1 plaintiffs.

2 **THE COURT:** Okay.

3 All right. I'd like to hear from the plaintiffs' counsel  
4 on this main argument about the causation, about the harm being  
5 really tied to really the government -- or the plaintiff being  
6 able to prevail on the merits, which is essentially your  
7 argument. Because if they're -- if the action is legal, then  
8 there's real no net harm.

9 **MR. KIRSCHNER:** The net harm not based on an illegal  
10 decision.

11 **THE COURT:** Yes. What's your response to that?

12 **MS. MACLEAN:** Well, we would certainly say that we  
13 make a case that plaintiffs can present a likelihood of success  
14 on the merits of both the APA and equal protection claim, but  
15 we would also identify that the asymmetry here, as the Court  
16 has recognized, is indisputable.

17 The harm for the government if there is a preliminary  
18 injunction that's entered here is really a delayed termination  
19 of TPS for people who've held that status for years or decades;  
20 where the harm for the TPS holders, both the plaintiffs and  
21 hundreds of thousands of other TPS holders, is immediate and  
22 not possible to remedy if a preliminary injunction is not  
23 issued before the end of the case.

24 **THE COURT:** So what is your legal answer to the  
25 government's argument that you have to look to -- you only

1 consider the harm that befalls the plaintiff if the action is  
2 illegal; but if it's legal, they really suffer no cognizable  
3 harm for balance of hardship purposes?

4 **MS. MACLEAN:** Well, the issue at this case -- at this  
5 point in the case is whether a preliminary injunction needs to  
6 be entered to preserve the status quo, and in this case the  
7 balance of -- the analysis of the balance of harms and the  
8 remedies is different.

9 It's also important to note that the plaintiffs --  
10 sorry -- the defendants are misrepresenting in part what the  
11 intention of the statute is. The statute is about humanitarian  
12 protection. Congress did not identify within the statute a  
13 limited number of times that the TPS status could be renewed  
14 for individuals who are on that status. Temporary Protected  
15 Status during these periodic reviews must be extended if the  
16 country conditions should be met.

17 So in this case if plaintiffs -- if defendants wrongly  
18 terminated TPS, the proximal cause of the harm is defendants'  
19 actions, not anything related to any sort of temporary nature  
20 of the statute or temporary nature of periodic designation  
21 within the statute.

22 **THE COURT:** Well, the argument, though, is if they're  
23 right, then there's no harm so you should look at who prevails  
24 on the merits almost as a precondition to determining whether  
25 there's an irreparable injury and balance of hardships.

1 And your legal position --

2 **MS. MACLEAN:** Your Honor, we don't assert that it is  
3 not relevant for this Court to consider whether we have a  
4 likelihood of success on the merits of both the APA and the  
5 equal protection claim. We believe that there is a  
6 likelihood -- a strong likelihood of success on the merits of  
7 the APA and equal protection claim, but also that there is a  
8 dramatic difference in the balance of equities and the harms  
9 that are at issue in this case.

10 As Your Honor identified is found in the *amicus* briefs in  
11 this case and as well in defendants' own evidence that they  
12 have presented statements from the Department of Defense, the  
13 Department of State, the Department of Homeland Security.  
14 We've tried to catalog those in what you have as Slide 14 of  
15 the slides before you.

16 So the balance is markedly on the side of plaintiffs for  
17 harms, public interest, and the balance of equities, but that  
18 is not to say that the Court should not also consider and find  
19 in favor of the plaintiffs on the question of the likelihood of  
20 success on the merits of both of the claims that are at issue  
21 here.

22 **THE COURT:** Do you have any comments on some of the  
23 stats that I asked about, whether there are stats that show how  
24 likely it is of people who will be removed once Temporary  
25 Protected Status is terminated and how many children will be

1 affected?

2 **MS. MACLEAN:** We can't know what the government will  
3 do with their action -- with any ultimate terminations of TPS  
4 status, but it is fair to say, as the government has already  
5 acknowledged, that people who have TPS are also eligible for  
6 other status. So people and many of the people -- all of the  
7 people who have TPS status from these countries have had it for  
8 years or decades. So presumably if they were eligible for some  
9 other status, they would have sought it already.

10 **THE COURT:** So you interpret these -- and the numbers  
11 that I have are numbers of people who are registered TPS  
12 recipients?

13 **MS. MACLEAN:** Yes. The numbers, as we understand  
14 them, and they're from the government's Federal Register  
15 notices, is that there are over 300,000 people from the four  
16 countries at issue in this litigation who have TPS.

17 This is not to say that individuals would not seek other  
18 forms of protection and are not already seeking other legal  
19 remedies that are available, but we would not dispute the  
20 assertion that the government has made that likely a very large  
21 number of those 300,000-plus people would not have another form  
22 of protection available and would be at grave risk of removal,  
23 family separation, and all of the harms that result from a loss  
24 of legal status.

25 **THE COURT:** All right. Let's get to the likelihood of

1 success and a showing on the merits. The two claims that are  
2 at issue here is the one under the Administrative Procedure Act  
3 and the equal protection component of the due process clause.  
4 So let's talk about the APA first.

5 **MS. MACLEAN:** Okay.

6 **THE COURT:** The government's argument, as I understand  
7 it, and there's several-fold, one is there was no real change,  
8 but on the legal question the government seems to argue that  
9 the requirement that any change in policy be accompanied by an  
10 explanation by the agency in order to comply with the APA only  
11 applies -- the purpose of that is to make sure that, quote,  
12 "regulated entities have fair notice" and that this rule sort  
13 of only applies to regulatory administrative actions; and that  
14 this is not the kind of regulatory action like in the *Encino*  
15 case, I guess it was, where it's about regulating exemptions  
16 under the Fair Labor Standards Act and, you know, a change in  
17 regulation of people who have to -- those who are affected have  
18 to conform their conduct to a regulation and so when the  
19 regulation changed, they need fair notice.

20 Do you have -- what's your position on that and what case  
21 law suggests that you don't have to be a regulated entity in  
22 order to impose the strictures that you are arguing are  
23 required by the APA?

24 **MS. MACLEAN:** First, if I may, Your Honor, I would  
25 just like to say that I will, with the Court's permission, I

1 will cover issues related to the APA and my co-counsel will  
2 address issues related to equal protection, as well as any  
3 issues that the Court may have --

4 **THE COURT:** All right.

5 **MS. MACLEAN:** -- with regard to remedy.

6 The government really cites no evidence for this  
7 distinction between regulated entities and nonregulated  
8 entities. And, in fact, in the language of their opposition,  
9 the government identifies that the purpose of the APA is to --  
10 they cite an unremarkable proposition from various cases that  
11 are cited that regulated entities and other interested parties  
12 should be able to have reasonable notice of a government -- of  
13 a change in agency practice.

14 And that's precisely what's at issue here, is that TPS  
15 holders are at least interested parties who are affected by  
16 agency decision-making in this case, the agency changing the  
17 rules of the game with regard to how TPS decisions are made.

18 There's myriad cases, some of which Your Honor cited in  
19 the order on the motion to dismiss, which make plain that the  
20 APA applies broadly to agency action, including settled  
21 practice.

22 **THE COURT:** What's an example of -- unlike *Encino*  
23 *Motors* where dealerships have to kind of figure out what  
24 they're going to do and how they're going to compensate service  
25 managers, can you give me some examples of where there's not

1 that kind of reliance interest on the relation?

2 **MS. MACLEAN:** Yeah. The Ninth Circuit recognized this  
3 in *Bonneville Power* and *California Trout* even though in  
4 *California Trout* the Ninth Circuit did not find an APA  
5 violation in this case. The Northern District of California  
6 also recently recognized this in the *Regents* case regarding the  
7 DACA rescission policy of this Administration.

8 **THE COURT:** Why don't you explain that a little bit,  
9 for instance, the *Bonneville Power*, of why that's not an  
10 example of a regulated entity whose reliance interests are then  
11 upset by a change in policy?

12 **MS. MACLEAN:** So *Bonneville Power* concerns the  
13 authority governing a fish passage center, and there were  
14 concerns from environmental groups about the change in the  
15 entity that had control over the fish passage center.

16 The Ninth Circuit recognized that the practice over  
17 decades of the fish passage center being managed by one entity  
18 could not be readily upset by a new solicitation that  
19 changed -- that would change the authority that was overseeing  
20 the fish passage center.

21 Similarly, in *California Trout*, while the court did not  
22 find an APA violation in that case, the court recognized that  
23 an APA violation could be found and could be determined by the  
24 implied rules of the court with regard to whether a late  
25 intervention would be permissible.



1 Obviously, these are different from the context of *Encino*  
2 *Motorcars* where you're talking about, you know, a regulated  
3 entity and a statute that's at issue.

4 **THE COURT:** And so your view is that you don't have to  
5 show sort of any particular reliance interest on the part of  
6 those subject to the regulation being unsettled or upset in  
7 order to trigger the APA requirement?

8 **MS. MACLEAN:** Certainly not, and the case law from the  
9 Supreme Court on down is clear that a reliance interest is not  
10 required.

11 **THE COURT:** When you say case -- what's a good example  
12 of case law that says no reliance interest is required?

13 **MS. MACLEAN:** Well, the -- I would say *Bonneville*  
14 *Power* is an example of that case. *American Wild Horse*  
15 *Preservation* in the D. C. Circuit is an example of that.

16 Where the reliance interests are relevant, and we  
17 certainly do think that there are reliance interests that are  
18 at play here, is that there is a particular obligation for a  
19 detailed reasoned explanation where there have been serious  
20 reliance interests. The U.S. Supreme Court has recognized that  
21 in *State Farm*, obviously in *Encino Motorcars*; and the  
22 Northern District of California cited to that holding in the  
23 *Regents* case identifying that DACA recipients, community  
24 members, colleges, and government actors had relied on the past  
25 practice with regard to the DACA policy of this

1 Administration -- of the prior Administration. Sorry.

2 **THE COURT:** So what would be the reliance interest  
3 here that TPS beneficiaries are relying not on the fact that  
4 there would never be a termination? Because as the government  
5 points out, the TPS is by its nature and its name temporary,  
6 but a more subtle reliance on the fact that the Administration  
7 and subsequent Administrations would look at all country  
8 conditions and not just those subject to the originating  
9 condition.

10 **MS. MACLEAN:** Yes, Your Honor. As the plaintiffs'  
11 declarations make clear, they have relied on the interpretation  
12 of the Temporary Protected Status statute over the years, in  
13 some cases decades that they've had TPS protection, to presume  
14 that as long as the country conditions remained such that it  
15 was unsafe for them to return, the TPS would not be terminated.

16 They have paid attention to what the Administration --  
17 what various Administrations have done with regard to TPS, and  
18 they have responded by becoming more integrated in their  
19 communities based on an analysis of both the Administration  
20 over time, various Administrations' practices, and an analysis  
21 of what was happening in their countries. So plaintiffs have  
22 bought homes, bought businesses, settled in communities,  
23 et cetera.

24 **THE COURT:** And so what your argument is that reliance  
25 interest does not preclude a change or a termination if

1 properly done but does preclude a change in the rules without  
2 an explanation?

3 **MS. MACLEAN:** Exactly, Your Honor.

4 **THE COURT:** And how fundamental must there be a  
5 change? How fundamental must a change be in order to trigger  
6 this requirement of an explanation? The government argues that  
7 they didn't really radically change the rules, it was just  
8 weighing factors differently. Now, if that were factually  
9 true, would that be sufficient or insufficient to trigger the  
10 explanation mandate?

11 **MS. MACLEAN:** First of all, that's not factually true.  
12 The change here, as voluminous evidence demonstrates, and I  
13 would be glad to discuss with you if that's of interest, but  
14 the evidence demonstrates that there was a category of  
15 information that was considered central as evident in the  
16 declaration of Leon Rodriguez, the former USCIS director,  
17 paragraphs 16 through 18 of his declaration, that was precluded  
18 from consideration by this Administration in their TPS  
19 determinations. That's precisely the kind of legal question  
20 that is at issue and that does constitute a rule.

21 This is not just a change in emphasis. It's not -- there  
22 are various other changes in agency practice that we have  
23 identified and is identified in the record, evidence including  
24 a change of the timing of when Federal Register notices are  
25 presented and who was responsible for drafting certain things,

1 those are not the kinds of changes where the APA obligation for  
2 a reasoned explanation would inherently be triggered. This is  
3 a fundamentally different kind of change.

4 **THE COURT:** So how do you distinguish between those  
5 that are, quote, "fundamentally different" and those that are  
6 not?

7 **MS. MACLEAN:** Well, the difference is made in the  
8 definition of agency action. Under the APA, agency action  
9 includes a rule and where -- and a rule includes and is defined  
10 to include an interpretation or implementation of law or  
11 policy. This is precisely what that is.

12 Some of the other changes that are identified may be  
13 relevant for the equal protection analysis but don't invoke  
14 that definition and would not be considered rules under the  
15 APA.

16 **THE COURT:** So the question is whether the change is  
17 to a rule?

18 **MS. MACLEAN:** The question is whether a change is  
19 agency action as defined under the APA. An agency action  
20 includes a rule. It's not limited to a rule, but the rule is  
21 what is at issue here.

22 **THE COURT:** Of course, there was no rule -- there was  
23 no explicit rule here. There was really more of a -- either an  
24 unwritten rule or a practice or a policy, which I had already  
25 found can constitute agency action.

1           **MS. MACLEAN:** Yes, and Your Honor is not the only one  
2 that has found that. The Ninth Circuit has found that. The  
3 D. C. Circuit has found that. Your Honor's decision previously  
4 recognized that in citations to *American Wild Horse*  
5 *Preservation Campaign* and *California Trout* and  
6 *Bonneville Power*.

7           But, yes, a settled practice can constitute -- can be a  
8 way that a rule is identified, delineated, and where -- and it  
9 can create that expectation where a reasoned explanation is  
10 required for any change.

11           **THE COURT:** But I guess I'm asking this question maybe  
12 in a third different way. How does one judge whether you call  
13 it a change in practice, a change in policy, a change in rule?  
14 When is it fundamental enough to trigger -- to constitute  
15 agency action that must be justified by an explanation? Is  
16 it -- does it depend -- is it a test of materiality somehow?  
17 Is it a test of how outcome determinative it is? Is it a test  
18 of -- how do you determine whether that change is significant  
19 enough?

20           **MS. MACLEAN:** It's difficult to identify exactly where  
21 something would fall on the line. In this case it's clear  
22 we're talking about a change in the law governing how decisions  
23 are made by the agency. Certainly other changes that are less  
24 clear may also trigger agency action.

25           So, for instance, you know, *California Trout* was speaking

1 about late interventions, which I would say is arguably a less  
2 significant change in law or policy than the change that we're  
3 talking about here.

4 Certainly not any change in the way that governments make  
5 decisions or the processes that governments go through -- the  
6 government or an agency goes through in making a decision would  
7 implicate the APA obligations.

8 **THE COURT:** So if you compare it to the case law, you  
9 get some idea where on the scale this is is your best answer, I  
10 guess?

11 **MS. MACLEAN:** Yes, Your Honor.

12 **THE COURT:** Okay. All right. Let me hear the  
13 government's counterview.

14 **MR. KIRSCHNER:** Yes, Your Honor.

15 And just as kind of a clarification, when we differentiate  
16 between APA and equal protection, just our view is they're both  
17 APA. One is an arbitrary and capricious claim and one is an  
18 equal protection claim pursuant to the APA. That's neither  
19 here nor there. I just kind of wanted to clarify that position  
20 for the record.

21 **THE COURT:** Okay.

22 **MR. KIRSCHNER:** So it's not our position that there  
23 aren't any regulated parties or interested parties here. There  
24 are. They are when there's a TPS determination, and that is  
25 where the interests lie.

1 And what's becoming clear is that this is not a collateral  
2 challenge, that this is a garden-variety challenge of what you  
3 would make to argue when an agency action determination is  
4 arbitrary and capricious.

5 And what's important in terms of thinking about this and  
6 taking a step back, plaintiffs' arguments really try to write  
7 out of the statute the judicial review preclusion provision the  
8 way that they have presented it for the PI and that this is not  
9 just challenging the terminations at issue today but really  
10 puts at risk future designations.

11 Because each Administration when it comes into power  
12 has -- puts different emphasis and different focus on different  
13 factors from its policy perspectives; and just as plaintiffs  
14 today are challenging a termination, another plaintiff can  
15 argue at a future date against a designation as a disruption  
16 from the practice of the current Administration.

17 And so --

18 **THE COURT:** Well, they would have to demonstrate that  
19 there was a change in some more systemic -- a systemic change  
20 that's not just, "Well, we've now looked at the same facts and  
21 think it's now safe to return because certain conditions have  
22 changed. We applied the same criteria." I think they've  
23 conceded that that kind of individualized decision would not be  
24 subject to review under the TPS statute but the change in  
25 systemic rules of what are you going to consider, do you

1 consider current conditions or only the originating conditions.

2 And as I understand the plaintiffs' argument, they're not  
3 even saying, at least not yet at this point, that an  
4 Administration could not adopt the view that you only look at  
5 originating conditions. They may take issue with that later, I  
6 don't know, if that ever happens; but I think the argument  
7 before us right now is that having made that change, it needs  
8 to be accompanied by an explanation and an acknowledgment and  
9 that hasn't happened here. So it's a very modest argument in a  
10 sense.

11 **MR. KIRSCHNER:** So I wanted to get into the case law,  
12 but I just wanted to -- because I think the case law sheds  
13 light on this because -- and why this really is putting at  
14 issue all of TPS in general.

15 They cite several cases and in each of those cases, the  
16 claim of a change in rule was something that impacted  
17 substantive or procedural rights. That's true for *McNary*  
18 itself, which is the idea of the interview process. That's --  
19 *McNary* involved a procedural right that didn't go to the  
20 substantive decision of adjustment of status and, therefore, it  
21 was viewed as collateral because there was a procedural right  
22 at issue.

23 Taking the cases that plaintiffs cite, *Bonneville* was a  
24 challenge to a substantive decision of the decision to transfer  
25 to a third-party contractor.



1        *California Trout* was at issue a procedural right, the idea  
2 of whether and at what time someone can intervene.

3        *Regents*, again, is a challenge to a substantive decision  
4 of whether DACA is or was in existence or was to be terminated.

5        *Wild Horses*, a substantive decision, whether a tract of  
6 land was protected or not protected for wild horses.

7        Again, every single instance that plaintiffs identify is  
8 that there is a procedural or a substantive right that is  
9 impacted by the purported new rule in those cases.

10       And so to answer your question at the end, when would this  
11 trigger the idea of a need for a new explanation for a new  
12 rule, it's when there are substantive or procedural rights  
13 impacted.

14       Here, and this goes back to my point about this not really  
15 being a collateral challenge, really their dispute is with the  
16 termination, which without dispute impacts substantively the  
17 individuals. But plaintiff -- but the key here is that, for  
18 the reasons we've discussed and is laid out in the statute  
19 previously, that Congress explicitly said that decision is not  
20 subject to judicial review.

21       And so plaintiffs, since they're making a collateral  
22 challenge, the collateral challenge has to be something that's  
23 impacting procedural or substantive rights for it to trigger  
24 the question of whether this is actually a new rule as a  
25 regulatory action subject to the APA arbitrary and capricious

1 standard.

2 **THE COURT:** Well, so a change -- whether you call it  
3 collateral or systemic, nonindividualized -- about what  
4 criteria to consider in extending or terminating TPS status, I  
5 mean, how does that not affect the substantive rights of the  
6 beneficiaries?

7 **MR. KIRSCHNER:** So that's what our -- I guess that's  
8 the point I'm trying to make, is that it's all tied up into the  
9 substantive decision of whether to terminate or not.

10 And so this is -- this is exactly how one would bring an  
11 arbitrary and capricious --

12 **THE COURT:** Well, it may result in the same -- you  
13 know, it's a -- you only get two choices: You terminate or you  
14 extend. I mean, it's one or the other, but the reason for  
15 reaching that decision may be different. One is due to a  
16 disagreement with the Secretary's assessment of the facts;  
17 another would be based on a change in the rules changing the  
18 criteria by which those facts are going to be considered across  
19 the board, not just one country to another.

20 There are individualized decisions and there are more  
21 systemic decisions, and they brought a more systemic challenge.

22 **MR. KIRSCHNER:** But how a Secretary weighs those  
23 factors, Your Honor, is not something that in itself is  
24 impacting the substantive or procedural rights. Every single  
25 case relied on by plaintiffs, the matter that was being

1 challenged impacted a substantive or procedural right in every  
2 single instance. They have not identified a single case in  
3 which the collateral challenge is itself not impacting  
4 procedural or substantive rights. It is only to the extent  
5 that they are in those cases challenging the procedural impact  
6 or the substantive impact of the decision.

7 **THE COURT:** I'm just -- I'm having trouble  
8 understanding what the distinction is. This is a procedural  
9 challenge to a systemic -- what they contend to be a systemic  
10 change in the procedure which in turn has a real-world  
11 substantive impact on rights. So I'm not sure I understand  
12 your distinction.

13 **MR. KIRSCHNER:** Because there's no interface with the  
14 public. Everything else, all those other cases are involving  
15 interfacing with the public. The interfacing with the public  
16 is the termination.

17 And it seems to us that plaintiffs are trying to have it  
18 both ways. To get around the judicial review preclusion  
19 provision, they argued at the motion to dismiss stage that this  
20 was collateral; but then when they were putting forth their  
21 arguments in the PI stage, they are talking about the impact of  
22 the ultimate decision, which is not subject to judicial review.

23 And so the key is, in each of these cases --

24 **THE COURT:** Well, I thought their argument is what's  
25 not subject to review is the ultimate decision whether it's

1 based on sort of judging the facts, applying the standard to  
2 the facts, and different Administrations and different  
3 Secretaries can come out differently on the same set of facts,  
4 but their challenge here is to the broader question of how  
5 those decisions are made. And even though it may result in an  
6 invalidation of that decision, at least temporarily, it is for  
7 a different reason.

8 **MR. KIRSCHNER:** Well, just I would posit that if  
9 plaintiffs were bringing an APA arbitrary and capricious  
10 challenge to the termination, it would look no different than  
11 the way they have brought their challenge today.

12 And our point is that when you're dealing with a  
13 collateral challenge like in *McNary*, at least there are  
14 procedural and substantive rights impacted under the new rule  
15 theory that plaintiffs are putting forth here. There is not  
16 anything in terms, again, interfacing with the public or rights  
17 or obligations that are flowing from the decision of how to  
18 weigh the factors.

19 What does impact the public is the termination or  
20 designation. That's what impacts the public, but that is  
21 something that is not subject to judicial review.

22 **THE COURT:** All right. Let me hear the response to  
23 that argument.

24 **MR. ARULANANTHAM:** I feel as though we're relitigating  
25 the jurisdictional question, Your Honor, but I'll cover it just

1 very briefly.

2 We don't put at issue other TPS decisions. I think their  
3 argument is actually foreclosed by *McNary*, and we actually had  
4 this exact discussion the last time; but under *McNary*,  
5 thousands of decisions, which obviously do actually affect the  
6 public, were set aside but that was permissible even though  
7 that statute foreclosed review of determinations because the  
8 underlying legal rules or predicate legal rules that go into  
9 those determinations were not covered by the jurisdiction-  
10 stripping provision.

11 Now, if we were bringing an arbitrary and capricious  
12 challenge, we would have said on the merits that the Sudanese  
13 Civil War is still continuing, which it is, and that there's a  
14 lot of violence in El Salvador and things like that.

15 Those are the arguments. The assessment on the country  
16 conditions, that's the -- that's what's foreclosed by the  
17 determination provision in the jurisdiction-stripping statute.

18 Instead what we're arguing about, what my co-counsel was  
19 arguing about is whether or not there is a category of  
20 evidence, intervening country conditions, which is no longer  
21 available for consideration. That is obviously different.  
22 That's a procedural argument. It's not about the substance of  
23 the determination itself.

24 That's really all we have to say on this subject. I don't  
25 know if you want to hear more about the APA, or if we should --

1 I leave it to you, Your Honor.

2 **THE COURT:** I have just a couple of questions more  
3 about the APA. One is, is there an easy way to locate the RAIIO  
4 reports? They seem to be scattered throughout the record and I  
5 had some trouble locating them. Is there an easy --

6 **MS. MACLEAN:** Yes, Your Honor. I think there's  
7 actually a footnote in defendants' opposition to the PI motion  
8 that references the RAIIO country conditions reports. We've  
9 cited some of them but I think not all of them.

10 **THE COURT:** So there's a footnote that identifies  
11 where they all can be found?

12 **MS. MACLEAN:** I believe so, and we can identify that  
13 when I sit down.

14 **THE COURT:** Okay.

15 **MS. MACLEAN:** And they should all be available in the  
16 administrative record that defendant submitted.

17 **THE COURT:** That would be helpful.

18 Is it your view that the -- you have sort of painted a  
19 narrative about how some of the initial reports -- and I don't  
20 know if these include the RAIIO reports or other things that  
21 were done by career people in the department -- contrasts with  
22 what was ultimately produced by the, quote, more political or  
23 political-appointed people.

24 Would a review of the RAIIO reports and contrasting them --  
25 and the country reports I guess -- and contrasting that with

1 the decisions, would that underscore this point or --

2 **MS. MACLEAN:** It would absolutely underscore this  
3 point, Your Honor. We can identify Haiti, for instance, as an  
4 example where the country conditions reports that are produced  
5 by RAIIO are in stark contrast to the ultimate decision memo  
6 that was presented.

7 The decision memo in the case of Haiti terminating TPS for  
8 Haiti explicitly identifies that country conditions that are  
9 elaborated at length in the RAIIO report are not relevant if  
10 they're not directly related to the original reason for  
11 designation.

12 Similar language is found in the decision memos with  
13 regard to other countries -- El Salvador, Nicaragua and  
14 Sudan -- despite the fact that the RAIIO reports are  
15 overwhelming in their elaboration of various country conditions  
16 that would be challenging for people to return. That is  
17 explicitly excluded from consideration in the decision memos.

18 I would also point the Court to an analysis of the various  
19 different drafts of decision memos where original drafts are  
20 prepared by the career experts. We see that in the case of  
21 Haiti and Sudan. These are elaborated as well in one of the  
22 slides that you have where early drafts of the decision memos,  
23 including the decision memo for Sudan that was described by  
24 Francis Cissna, who's the current USCIS director, was  
25 identified as entirely incoherent. That was the e-mail that

1 described the decision memo as looking like someone was clubbed  
2 over the head.

3 **THE COURT:** Like a mugging?

4 **MS. MACLEAN:** Like a virtual mugging.

5 And that's because the first part of the decision memo was  
6 drafted by a career expert who had elaborated relying on the  
7 country conditions report by RAIIO as he had always done. He's  
8 someone who has worked in the Administration for a decade to  
9 consider various country conditions that were at issue.

10 The latter part of the memo, which at the time that  
11 Francis Cissna saw it had already been signed by the acting  
12 director of USCIS, included a set of recommendations that were  
13 added on by political appointee of the head of the Office of  
14 Policy and Strategy, Kathy Nuebel Kovarik, that excluded any  
15 country conditions that were not originating conditions.

16 **THE COURT:** All right. So those facts go to whether,  
17 in fact, there was a change in terms of whether intervening  
18 conditions were considered or not?

19 **MS. MACLEAN:** Yes, Your Honor.

20 **THE COURT:** And they also might inform the equal  
21 protection analysis --

22 **MS. MACLEAN:** Yes, Your Honor.

23 **THE COURT:** -- as well.

24 Let me ask. Did the change in -- the changes in the  
25 process, for instance instigating an inquiry as to whether



1 Haitian beneficiaries -- what the crime reporting and the  
2 public benefits rate is; whereas -- and you contend that had  
3 never been done previously by anybody -- is that a change that  
4 triggers or that just informs whether or not there was a change  
5 in the rules?

6 **MS. MACLEAN:** Your Honor --

7 **THE COURT:** What's the relevance of that under the  
8 APA?

9 **MS. MACLEAN:** It is not directly relevant to the APA  
10 analysis. For the APA analysis, all that needs to be found is  
11 that there is a settled past practice, that there was a change  
12 in that practice, and that there was no reasoned explanation  
13 about that change.

14 In this case the third issue is almost irrelevant because  
15 the government denies, in fact, that there was a change. So  
16 the main issue at play with regard to the APA analysis is  
17 whether there was a settled past practice and whether there is  
18 a current practice.

19 There are various changes that the record makes crystal  
20 clear, including changes of the timing for the Federal Register  
21 notices, the seeking of irrelevant data that the government had  
22 not sought previously and, thus, had great difficulty in  
23 actually acquiring because it had not previously been  
24 collected, as well as these sort of eleventh-hour radical  
25 transformations of the decision memos which the Secretary

1 signed and which had not happened before a long-time career  
2 official, Don Neufeld, the head of the Service Center  
3 Operations, said that this was something that was very  
4 inconsistent with past practice as identified at the -- with  
5 the first periodic review, with the periodic review of Haiti,  
6 but became -- the inconsistency and incoherence and dramatic  
7 changes became consistent over time with this Administration,  
8 although they varied dramatically from previous  
9 Administrations.

10 **THE COURT:** So how is that relevant to the APA?

11 **MS. MACLEAN:** It's not relevant to the APA. It's  
12 circumstantial for the APA. It is directly relevant for the  
13 *Arlington Heights* analysis in the equal protection claim.

14 **THE COURT:** And how is it circumstantially relevant to  
15 the APA?

16 **MS. MACLEAN:** To be clear, it is not -- the Court need  
17 not identify even that any of those changes occurred with  
18 regard to the APA. The APA claim specifically is around the  
19 rule change in terms of the interpretation of the statute.

20 The fact that that rule change is so readily apparent  
21 exists alongside these dramatic additional changes that we see  
22 with this Administration, which is relevant to the APA analysis  
23 that that rule change was in part driven by racial animus.

24 **THE COURT:** Is it relevant to -- I understand the  
25 equal protection argument, but is it relevant to the APA

1 because it shows some motive for rule change and, therefore, it  
2 tends to substantiate that there was, in fact, a rule change?

3 **MS. MACLEAN:** It could substantiate that there was a  
4 change. It is not required. Really the APA claim is  
5 extraordinarily narrow and the Court can find that without any  
6 other changes. If the only change that the Court identified  
7 was this change in the statutory interpretation or the way that  
8 the statute was being interpreted by the agency, that would  
9 create this obligation for reasoned explanation that the  
10 government acknowledges that they have not provided because  
11 they deny that the rule change, in fact, occurred.

12 **THE COURT:** All right. So subsequent to this Court's  
13 order denying motion to dismiss and the various facts,  
14 quote/unquote, that were mainly documents that were quoted in  
15 that order, what has -- if you could summarize what has emerged  
16 through discovery to substantiate the fact of a rule change,  
17 what would you point to?

18 There's the declarations of former Director Rodriguez and  
19 Ambassador Nealon. What else would you point to?

20 **MS. MACLEAN:** Yes. So certainly the testimony of  
21 former Director Rodriguez, as directly contrasted with the  
22 sworn testimony of current DHS Secretaries, is highly relevant  
23 in identifying that there was a rule in the past and that rule  
24 has been dramatically changed.

25 A comparison of the decision memos, the decision memos

1 from prior --

2 **THE COURT:** I went through that in my order fairly  
3 extensively.

4 **MS. MACLEAN:** But we didn't have actually, at the time  
5 of your order, the decision memos.

6 **THE COURT:** Oh, the decision memos.

7 **MS. MACLEAN:** Yeah.

8 **THE COURT:** So contrasting the decision memos?

9 **MS. MACLEAN:** Yes.

10 I would just add that in Footnote 12 of the defendants'  
11 opposition, defendants for the first time also acknowledge that  
12 the Federal Register notices terminating TPS in this  
13 Administration diverge markedly from Federal Register notices  
14 of previous Administrations, something that Your Honor had  
15 already found.

16 The decision memos we now have and were not part of the  
17 record at the time.

18 **THE COURT:** What do they show regarding the change?

19 **MS. MACLEAN:** So with -- the decision memos are, in  
20 the interest of clarity, based on the country conditions  
21 reports. They're prepared by USCIS. They're ultimately signed  
22 by the USCIS director with a recommendation to the DHS  
23 Secretary and then ultimately signed by the DHS Secretary that  
24 Kathy Nuebel Kovarik identified as the way that a decision is  
25 ultimately made.

1 And we have in the record past decision memos that were  
2 signed by Leon Rodriguez from 2016 specifically for El Salvador  
3 and Nicaragua and those differ markedly from the termination  
4 decision memos of this Administration for the same countries.  
5 That's evident in Slides 3 and 4 that you have before you where  
6 in Leon Rodriguez's decision memo we see exactly what he  
7 described in his declaration, that the TPS is being extended  
8 not only for the originating conditions but also and explicitly  
9 because of subsequent environmental disasters.

10 In contrast, in Slide 4 we see the termination decision  
11 memos of this Administration for the same countries where the  
12 termination memos state that termination is recommended  
13 because, quote, "current challenges cannot be tied to," end  
14 quote, the original conditions. There's a clear conflict  
15 there.

16 Your Honor already identified the comparison between the  
17 RAI0 country conditions reports and the decision memos. That's  
18 extraordinarily important for this analysis as well. From the  
19 record evidence in this case, we know that the RAI0 country  
20 conditions reports, unlike the decision memos, have largely  
21 remained unimpacted by political influence, and so they do  
22 provide a detailed analysis of the facts on the ground at a  
23 particular point in time where the career experts are  
24 conducting their analysis.

25 It's the country conditions reports that USCIS draws on in

1 crafting a decision memo. And what we know is in -- and the  
2 record evidence makes clear under prior Administrations a broad  
3 array of country conditions within the RAIIO reports would be  
4 drawn on where that was not the case with regard to this  
5 Administration.

6 And specifically Slide 5 includes the language from the  
7 Haiti TPS termination decision memo, which states that any  
8 current issues in Haiti are unrelated to the 2010 earthquake.  
9 So it doesn't deny that the country conditions in the RAIIO  
10 report exists; it just excludes them from the calculus.

11 The last thing that I would highlight is the statements of  
12 both -- of decision-makers, political actors, and the career  
13 experts. So we have, for instance, DHS Secretary Duke stating  
14 explicitly in an e-mail to then DHS Secretary Kelly that the  
15 TPS decisions represented a strong break with past practice. I  
16 believe that's Exhibit 30 in plaintiffs' exhibits.

17 We have also in the record Plaintiffs' Exhibit 2 which  
18 provides *prima facie* evidence of the old and the new rules  
19 where Kathy Nuebel Kovarik, the head of the Office of Policy  
20 and Strategy, expresses concern about three presumably Central  
21 American memos which, quote, "read as though they'd recommend  
22 an extension." This is identified in Slide 6.

23 The career expert responds that all the standard metrics  
24 do justify extension and the only way to justify termination  
25 would be to limit consideration to country conditions that are,

1 quote, "clearly linked to the initial disasters prompting the  
2 designations."

3 So in sum, it reads as the old rule or all the standard  
4 metrics that the career expert was familiar with and had used  
5 when prior Administrations required that TPS be extended, and  
6 to get to the termination decisions, a new rule had to be  
7 applied.

8 **THE COURT:** All right. Let me ask the government. It  
9 seems to me that by every measure there was a change inasmuch  
10 as it -- whether you look at the Federal Register notices,  
11 whether you look at the decision memos, whether you look at the  
12 testimony of Secretary Nielsen to Congress, whether you look at  
13 the memo from Ms. Kovarik, whether you look at the Duke e-mail,  
14 they all indicate there was a change.

15 Now, you can say that's not a fundamental change, that's  
16 not one triggering the APA for various reasons, but how can you  
17 possibly say that there wasn't a change from prior practice of  
18 considering all conditions that may affect the conditions in  
19 the country that would make it safe or unsafe for people to  
20 return and one that says now it has to be clearly tied to the  
21 originating condition only?

22 **MR. KIRSCHNER:** Your Honor, plaintiff spent a lot of  
23 time not talking about the actual decision-makers, and I would  
24 point you to two specific exhibits that we cited in our brief.  
25 Acting Secretary Duke wrote an e-mail, contemporaneous e-mail,

1 to Chief of Staff of the White House John Kelly explaining her  
2 decision to not terminate Honduras. She said (reading):

3 "The originating conditions no longer exist but I am  
4 not terminating because I've received information that  
5 Honduras cannot adequately provide for the safe return of  
6 its nationals."

7 **THE COURT:** But she made the decision that that's the  
8 only reason to save Honduras, and that was a temporary  
9 extension as I recall, not to say that they're going to stay on  
10 the list but right now things are so -- we can't figure out a  
11 safe way to bring people home.

12 **MR. KIRSCHNER:** Well, but that's --

13 **THE COURT:** The predicate of there no longer being a  
14 lingering condition tied to the originating event seemed to  
15 have been found there as well.

16 **MR. KIRSCHNER:** So that's exactly the same language  
17 from the 2016 memos on Slide 3 of plaintiffs' slides. In  
18 talking about Nicaragua, it said (reading):

19 "Subsequent environmental disasters have substantively  
20 disrupted living conditions such that Nicaragua remains  
21 unable temporarily to handle adequately the return of its  
22 nationals."

23 Same for El Salvador. Again, they both are talking about  
24 current conditions in the context of safe return of its  
25 nationals.



1 And this was not just an e-mail that Acting Secretary Duke  
2 wrote to Chief of Staff John Kelly?

3 **THE COURT:** What exhibit number is that?

4 **MR. KIRSCHNER:** I believe it's Exhibit 3 -- sorry --  
5 Exhibit 7. Exhibit 7 of our opposition. And she's writing  
6 about Nicaragua and Honduras, and for these purposes I'm  
7 talking about the Honduras discussion in that e-mail.

8 **THE COURT:** Do you know where it is in the Degen?

9 **MR. KIRSCHNER:** Yeah, if I can get a binder from here  
10 to pull up.

11 **THE COURT:** Yeah. Yeah.

12 (Pause in proceedings.)

13 **MR. KIRSCHNER:** Yeah, so it's -- it's Exhibit 7 and  
14 it's the e-mail from what says S2ECD to John Kelly, and we  
15 would stipulate that that e-mail is from -- well, at the bottom  
16 of the e-mail it says Elaine Duke, Acting Secretary, Department  
17 of Homeland Security. It's Monday, November 6th, at 3:23 p.m.

18 **THE COURT:** Does this have a DPP Bates number?

19 **MR. KIRSCHNER:** Yes. It's RFPD4, 0004.

20 **THE COURT:** Okay. For some reason I only have it -- I  
21 have the plaintiffs' exhibit numbers. I don't know -- I know  
22 there's a version of that somewhere in here because I remember  
23 reading what you just said, and I don't --

24 **MR. KIRSCHNER:** I'm happy to give you my copy here.

25 **THE COURT:** All right.

1           **MR. KIRSCHNER:** Just --

2           **THE COURT:** Unless the plaintiff knows which number it  
3 is in the Degen.

4           **MS. MACLEAN:** Your Honor, 135 is the full e-mail.  
5 It's a slightly more limited version than defendants have  
6 produced.

7           **MR. KIRSCHNER:** It's the bottom e-mail that we're  
8 citing for those purposes.

9           **THE COURT:** 135? That's DPP Number 3533? 3531? Is  
10 that the same?

11           **MR. KIRSCHNER:** I'm happy -- plaintiffs -- there is  
12 another e-mail that plaintiffs rely on for other purposes that  
13 had a top e-mail. Our purposes for relying on this document  
14 was for the --

15           **THE COURT:** Why don't you give me your copy because  
16 I'm not sure.

17           **MR. KIRSCHNER:** Okay. In the third -- the sentence I  
18 want to give to you is the second bullet point and it's the  
19 third full sentence and it starts with "The Department of State  
20 reports." That's the sentence I'm referring to.

21                               (Pause in proceedings.)

22           **THE COURT:** So it's the second bullet point?

23           **MR. KIRSCHNER:** Second bullet point, third full  
24 sentence. It starts "The Department of State."

25           **THE COURT:** So this is where -- this is from --

1           **MR. KIRSCHNER:** The bottom of the e-mail is signed  
2 Elaine Duke.

3           **THE COURT:** From Secretary Duke to Kelly saying  
4 that -- referring to the extension of six months under no  
5 decision -- deferring the decision essentially. (reading)

6           "Much documentation I received is conflicting. The  
7 Department of State reports that country conditions do not  
8 exist but it also states that Honduras is unable at this  
9 time to adequately hand the return" -- maybe that's  
10 "handle the return of their 86,000-plus nationals."

11           So it does state that the country conditions do not exist.  
12 Does that mean the country conditions tied to the original or  
13 generally?

14           **MR. KIRSCHNER:** I understand it as the original  
15 conditions no longer exist.

16           **THE COURT:** Okay.

17           **MR. KIRSCHNER:** And what in support is, Acting  
18 Secretary Duke wrote an internal memo -- this is a different  
19 exhibit that I'm referring to now -- that's consistent with  
20 this e-mail, and that is her internal memo that talks about her  
21 struggling with her decisions -- of the various decisions  
22 before her. And in that, she makes the decision not to  
23 terminate El Salvador or Honduras at that time, and she says,  
24 both about Honduras and El Salvador, that the originating  
25 conditions no longer exist but -- and she uses the term --

1 "discretionary factors," is the term she uses in that internal  
2 memo, "provide that neither El Salvador nor Honduras can  
3 provide for the safe return of their nationals and, therefore,  
4 I am not terminating at this time."

5 **THE COURT:** But I don't see how that changes the basic  
6 premise; and that is, at this point they are looking only at  
7 country conditions tied to the originating event which gave  
8 rise to TPS status, whether at that point having found that  
9 that no longer obtains, whether they should go forward and  
10 terminate or defer given that the government says they can't --  
11 the Honduran government says they can't handle it and maybe in  
12 the exercise of discretion to delay.

13 That doesn't mean that the fundamental analysis is not  
14 consistent with what the plaintiffs are saying; that is, at  
15 this point they are only looking at country conditions that are  
16 tied to the original conditions. They're not saying, "Let's  
17 look at everything."

18 **MR. KIRSCHNER:** So a couple of responses to that,  
19 Your Honor. First, if you look at Slide 3 of plaintiffs'  
20 slides, that's exactly the same thing that they're saying in  
21 terms -- that plaintiffs are pointing out about whether they  
22 can provide for the adequate return of the nationals.

23 **THE COURT:** Well, that's due to subsequent  
24 environmental disasters subsequent to the originating  
25 condition, which was Hurricane Mitch.

1           **MR. KIRSCHNER:** But by definition, Your Honor, the  
2 question of whether individuals can safely return to those  
3 countries, which is the term in the statute, it requires the  
4 conditions on the ground at that time, and that's exactly what  
5 Acting Secretary Duke is both explaining to Ambassador -- I  
6 mean, not Ambassador -- Chief of Staff John Kelly and in her  
7 internal memo.

8           And I want to -- kind of further to illustrate this point  
9 is plaintiff spent a lot of time talking about the USCIS  
10 decision memo. They ignore that Acting Secretary Duke  
11 explicitly asked for the recommendation of or the assessment of  
12 Admiral Tidd, head of Southern Command, about how a termination  
13 would impact military operations. And, indeed, explains in an  
14 e-mail to Chief of Staff John Kelly, a different e-mail on  
15 Exhibit 3 of our opposition, that those foreign policy  
16 considerations about Honduras and how she's going to be meeting  
17 with Admiral Tidd factored into her decision.

18           She also explicitly asked for the input of  
19 Ambassador Nealon. Ambassador Nealon was Assistant Secretary  
20 of International Affairs and Acting Undersecretary of Policy  
21 under Elaine Duke. He had served for 33 years in the State  
22 Department previously and had served for three years as  
23 ambassador to Honduras from 2014 to 2017, and he wrote a memo  
24 explaining his thought process for Nicaragua, El Salvador, and  
25 Honduras.

1           **THE COURT:** And he recommended against termination;  
2 didn't he?

3           **MR. KIRSCHNER:** And Elaine Duke decided not to  
4 terminate Honduras or El Salvador at that time.

5           And so she -- and he says in his deposition testimony that  
6 she explicitly asked him for his input. So she went out of her  
7 way to ask for input from Southern Command from  
8 Ambassador Nealon.

9           **THE COURT:** But getting input and making the ultimate  
10 decision in deciding what to weigh or what to consider in that  
11 ultimate decision are two different things.

12           **MR. KIRSCHNER:** Well, but we have -- but we have  
13 realtime communications and internal notes from Acting  
14 Secretary Duke both in her e-mails to John Kelly and in her  
15 internal memo that she took into account what the conditions of  
16 the countries were at the time of making the decision to  
17 whether they could provide for the adequate return of their  
18 nationals.

19           She also talked about looking at intelligence assessments.  
20 She talked about the State Department assessments and other  
21 intelligence assessments and the various recommendations that  
22 she received.

23           And so if you look at the totality of the record, we would  
24 posit that it's -- that there might be a difference in  
25 emphasis, as every Administration has differences in emphasis,

1 as would be expected, but that the language that Acting  
2 Secretary Duke used in her e-mails is not very different than  
3 the emphasis put on with these decision memos that they cited  
4 in their Slide 3.

5 **THE COURT:** Well, and, actually, as I understand your  
6 argument and the briefs, that the government argues that the  
7 TPS statute requires consideration of current conditions in  
8 determining whether folks can be safely returned; and that is  
9 evidence that if it requires it, then you presume that the  
10 Secretary followed that. That's part of your argument?

11 **MR. KIRSCHNER:** Correct, Your Honor, and that the  
12 evidence backs that up, the evidence I just cited.

13 **THE COURT:** So -- well, that's interesting because  
14 that suggests that the TPS statute, if we ever got to this  
15 issue, actually does require as a substantive matter  
16 consideration of conditions other than the originating  
17 conditions.

18 **MR. KIRSCHNER:** Well, and in the deposition of Kathy  
19 Nuebel Kovarik, she acknowledged that as well. They talked a  
20 lot about her deposition and her e-mails, but she also  
21 acknowledged that that we cited in our brief.

22 And so I would just say that I would refer Your Honor to  
23 the full record and to the materials that we have cited that we  
24 think supports the notion that there might be a change of  
25 emphasis, but that is not -- and this goes back to the legal

1 question that we were discussing earlier is what do you do when  
2 there's a change in emphasis coming in with different -- a  
3 different Administration comes in maybe with a different  
4 perspective but it's a question of how to weight certain  
5 factors.

6 **THE COURT:** All right. Let me hear the response from  
7 the plaintiffs on this question, including the fact that  
8 Secretary Duke, you know, appears to be, in looking at whether  
9 or not it's practical at this point to return beneficiaries  
10 back to Honduras, talking to the admiral, talking to the former  
11 ambassador, et cetera, about assessing all conditions, not just  
12 the originating condition. What's your response to that?

13 **MR. ARULANANTHAM:** Well, you know, on the first one  
14 about whether it's really always been considered as part of  
15 repatriation, whether it's safe to repatriate people, I think  
16 the best answer to that is former Director Rodriguez's  
17 declaration in paragraph 17 he specifically refutes this point.  
18 What he says is he says, "We always considered, you know,  
19 everything: Disasters, issues of governance, housing,  
20 healthcare, et cetera." And he says (reading):

21 "This was true regardless of whether those intervening  
22 factors had any connection to the event that formed the  
23 basis of the original designation or to the country's  
24 recovery from that originating event."

25 And that's, I think, the clearest crystallization of the



1 point; but if you read, Your Honor, the RAIIO reports or these  
2 other reports, there's extensive discussion of the various  
3 problems that exist in these countries that are not talking  
4 about the context of whether it's safe to return their  
5 nationals. I mean, it's just overwhelmingly just discussions  
6 about country conditions, about in general whether country  
7 conditions remain very serious.

8 And if their account were true, I don't know how you would  
9 explain -- you know, Your Honor had said it yourself -- all the  
10 testimony and all these other statements, which are obviously  
11 describing something which is different.

12 And they also point to this -- to Exhibit 30, the  
13 statement from Ambassador -- excuse me -- Secretary -- the  
14 e-mail exchange between Acting Secretary Duke and Chief of  
15 Staff John Kelly, and I think that's a really bad piece of  
16 evidence for them because she says about Honduras (reading):

17 "This decision is a strong break with past practice."

18 And she says (reading):

19 "These decisions" -- and here she's talking about all  
20 the decisions she's making at that same time together --  
21 "will send a clear signal that TPS in general is coming to  
22 a close. I believe it is consistent with the President's  
23 position on immigration and puts it in the best position  
24 to work with Congress to address DACA and TPS recipients."

25 Which was, you know, what was actually going on here, was

1 that the President was trying to end TPS for all these  
2 countries to create pressure for a more restrictionist  
3 immigration bill.

4 So this does not prove that the preexisting objective  
5 analysis of country and conditions, which happened before, was  
6 continuing to happen. I mean, this proves our statutory  
7 argument.

8 **THE COURT:** So what's your interpretation of the  
9 discussion about Honduras and the fact that country conditions  
10 don't exist, we can't just send back 86,000 nationals at this  
11 point; therefore, that implicitly means that consideration is  
12 given to other conditions than the country conditions narrowly  
13 defined?

14 **MR. ARULANANTHAM:** Yeah. I think it's true that she  
15 was obviously -- in trying to decide this decision, she wasn't,  
16 you know, strictly adhering to, you know, the newly formulated  
17 rule in that description, you know, in that particular passage.  
18 What she does is issue -- is not make a decision and then  
19 Honduras ends, you know, just a few months after we filed this  
20 lawsuit.

21 And, you know, when they say El Salvador -- you know, she  
22 decides not to terminate El Salvador at that time, the decision  
23 date wasn't at that time. The Administration was pushing them  
24 to make the decision right then in advance. Instead, she just  
25 waited and the decision happened at the next decision point,

1 which was January.

2 That was Secretary Nielsen who made that decision, and the  
3 next time El Salvador came up, it got terminated. So it's  
4 quite deceptive I think -- or misleading. I don't mean to say  
5 something against my opponent. I don't think it's fair to  
6 characterize this as saying that she chose to extend  
7 El Salvador in some way. El Salvador is terminated two months  
8 after this conversation takes place.

9 Now, as to the input, Your Honor --

10 **THE COURT:** Yeah.

11 **MR. ARULANANTHAM:** -- SOUTHCOM -- what SOUTHCOM said  
12 is quite striking. It says, "If you end TPS for Haiti, there  
13 will be all kinds of instability." It implies that the U.S.  
14 might have to get involved in Haiti, and similar statements  
15 from SOUTHCOM are made as to El Salvador. So the input is  
16 "Don't end TPS for these countries" and, of course, they do it  
17 anyway.

18 Similarly, Ambassador Nealon obviously says in his report,  
19 his nonconcurrence memo, that he would extend TPS for these  
20 countries.

21 So, yes, it's true that she was considering sources from  
22 elsewhere but the effect of that consideration was obviously  
23 ignored in favor of the overwhelming pressure created by the  
24 new rule and the Administration's politics underlying it, which  
25 I'll get to, you know, as soon as we talk about the equal

1 protection clause.

2 **THE COURT:** All right. What's your -- do you have a  
3 legal response to the argument that the TPS statute actually,  
4 in assessing whether people can be safely returned, actually  
5 mandates consideration of all current conditions?

6 **MR. ARULANANTHAM:** I see in the evidence a distinction  
7 that the agency has drawn between this question of assessing  
8 current country conditions writ large on the one hand and then  
9 what I see is a different although related question, which is:  
10 Is the country in a position to accept the return of its  
11 nationals, which seems to depend on how many there are and what  
12 time frame, and things like that?

13 So to me those are analytically distinct questions, but I  
14 think Your Honor is right that the way -- if this is what you  
15 intended to say, I think the government is now boxed into  
16 they're committed to the view that the statute requires  
17 consideration of current country conditions.

18 So I think if we win, that, in fact, the agency was not  
19 considering current country conditions, which is what their  
20 testimony said, and there's lots of evidence of that, then they  
21 have sort of boxed them into the fact that they have violated  
22 the statute.

23 **THE COURT:** All right. Let's go on to equal  
24 protection.

25 The government -- since you're up, obviously there's a

1 threshold question as to what standard of review applies here  
2 in light of the *Trump versus Hawaii* case, and they've cited  
3 what is cited in the *Hawaii versus Trump* case three decisions:  
4 *Kleindienst*, *Fiallo versus Bell*, and *Rajah versus Mukasey*. So  
5 there's some broad language in there about deference to the  
6 government, to the Legislative and Executive Branches when it  
7 comes to matters of immigration, particularly admission of  
8 alien -- admission, which is one distinction. There's also  
9 mentioned in *Fiallo* about national security.

10 But there's also reference in there to Congress' and the  
11 Executive's power to exclude or expel. So there is reference  
12 not just to admission but also the removal.

13 How do you -- what's your analysis of that language? I  
14 mean, one could read that broadly as saying, well, anything  
15 having to do with the admission or expulsion of aliens falls  
16 under this kind of overpowering authority of the Executive and  
17 the Legislative Branch subject to very little judicial  
18 scrutiny. What do you say about that language in *Kleindienst*  
19 and *Fiallo*?

20 **MR. ARULANANTHAM:** Two thoughts, Your Honor. I think,  
21 first, that formulation, exclude or expel, goes right back to  
22 the 1890s, and you'll find similar language I believe in *Fong*  
23 *Yue Ting* -- F-O-N-G Y-U-E T-I-N-G -- in *Yamataya v. Fisher*,  
24 right back this exclude or expel language is there.

25 But from very early on, the courts, nonetheless,

1 distinguished between the power to exclude people and the power  
2 to deport them. And, you know, from 1903, the due process  
3 protections for people in the country have been different from  
4 those who are seeking admission and, similarly, other  
5 substantive rights have followed along accordingly.

6 **THE COURT:** And what's the first landmark case that  
7 draws that distinction?

8 **MR. ARULANANTHAM:** *Yamataya v. Fisher* in 1903 says  
9 that the due process clause protects a woman facing  
10 deportation. She'd been here just a matter of days. And  
11 that's the first case in terms of constitutional immigration  
12 law which draws the line between exclusion and expulsion. But  
13 then the line persists and you see case after case saying  
14 "We've long drawn this distinction between people seeking  
15 admission and people who are already here."

16 This gets to the second point on this, Your Honor, is that  
17 *Zadvydas v. Davis*, which we cite in the reply brief here, is  
18 about people who are living here, then are ordered removed,  
19 have lost the right to live here, and there's a debate now  
20 about whether they can be detained given that the countries  
21 will not take them back. Their countries of origin will not  
22 take them back.

23 It applies hornbook substantive due process law to that  
24 question ultimately ruling on statutory grounds but only after  
25 a fairly substantial constitutional analysis. It's about

1 expelling people, not excluding them, yet nonetheless implies  
2 normal due process law. And it's about foreign policy. In  
3 fact, there's extensive discussion about the effect of this on  
4 repatriation negotiations. That's one.

5 There are other cases too that do not apply the extremely  
6 deferential standard of review that's operating in *Trump* -- in  
7 *Kleindienst*.

8 **THE COURT:** Is there a difference, though, between due  
9 process, Fourth Amendment, Fifth Amendment rights and equal  
10 protection rights, especially an equal protection challenge  
11 that's based on national origin, which, of course, gets to the  
12 core of a lot of immigration policy?

13 There's an argument that at least equal protection  
14 involves a different set of considerations in looking at  
15 whether procedural due process was violated or whether the  
16 Fourth Amendment violation was violated.

17 **MR. ARULANANTHAM:** So you're pressing me a little bit  
18 here because we haven't briefed this subject and this isn't a  
19 motion for reconsideration I think, but going a bit from  
20 memory, the Ninth Circuit's decision in *Kwai Fun Wong* is  
21 involving an excludable, so it's a person who is denied  
22 admission and subject to expedited removal but the court,  
23 nonetheless, holds that the proscriptions against I believe  
24 it's either race discrimination or religious discrimination, or  
25 maybe it's a combination of them, would still apply to that

1 person.

2 And my underlying point here is to say that, if anything,  
3 I think the courts would view equal protection as on the other  
4 side of that line, and they would say the proscription on race  
5 discrimination is tantamount to the proscription on torture or  
6 the proscription on, you know, certain other very basic  
7 fundamental protections that we would apply to people, and even  
8 as long as they were on the territory of U.S. soil, whether or  
9 not they were seeking admission or instead being expelled.

10 But, I mean, I'm struggling a bit. I know this issue is  
11 open in the dissent in *Jean v. Nelson*, which is a Supreme Court  
12 case about Haitians, about the racially discriminatory  
13 treatment of Haitians versus Cubans, and the majority  
14 Supreme Court rules in favor of the plaintiffs on a statutory  
15 ground. The dissent on other grounds, basically  
16 Justice Marshall dissent says, "Well, we should look at the  
17 constitutional question here," and then provides a long  
18 explanation for why the proscriptions on race discrimination  
19 should operate in that context.

20 So I don't think that the government has really a leg to  
21 stand on if they want to say, "Oh, we can engage in race  
22 discrimination because these are people who are -- even if they  
23 were people who were seeking admission," and they certainly  
24 can't -- don't have authority to support that proposition with  
25 respect to people who are already here.



1 I think the critical point about *Kleindienst* and *Fiallo*  
2 and *Rajah* -- there's two. One, as Your Honor said, is there  
3 people who are seeking admission and people who are --

4 **THE COURT:** *Rajah* was a deportation.

5 **MR. ARULANANTHAM:** Yes, in *Rajah*.

6 And the second one is selective enforcement claims are  
7 fundamentally different, and I think *Arab-American*  
8 *Anti-Discrimination v. Reno*, *AADC v. Reno*, was really the  
9 genesis of this idea, although I think it's also in *Kleindienst*  
10 to some extent because in *Kleindienst* it's because this person  
11 had previously violated their visa. That's the facially  
12 legitimate reason that is given for denying the professor the  
13 visa to come back now.

14 So these strands have come together and in *Trump* they come  
15 together because *Trump* is citing *Rajah* even though it's a case  
16 about people who are here.

17 But the point is *Rajah* is a case about a person who has  
18 violated their visa. There's no dispute about that. They  
19 violated their visa. The only reason they're called in is  
20 because of the special registration program. They bring an  
21 equal protection challenge to that, and what the court says is,  
22 "You've already violated the terms of your visa so here you're  
23 just making a selective enforcement argument. That even though  
24 you violated the terms of your visa, we still shouldn't proceed  
25 against you because you say you're being targeted because of

1 your race."

2 And in that situation, we apply a very, very low standard  
3 of review. And in that sense they're following very precisely  
4 *AADC v. Reno*, which is exactly the same. You have a set of  
5 people, they're Palestinian activists. They have violated the  
6 terms of their visa. They allege that they're being targeted  
7 because of their First Amendment activity, and the court says,  
8 "Because you are already -- everyone agrees you are here in  
9 violation of the immigration laws and you're just saying that  
10 the motivation that went to why you were being targeted is  
11 impermissible, we apply a deferential standard of review."

12 That's fundamentally different from a situation like our  
13 case where our claim is they are lawfully here and the  
14 government is taking away that status based on racial animus.  
15 That's fundamentally different from a situation where the  
16 person is already in violation of the immigration laws and  
17 they're essentially asking for a reprieve on the ground that  
18 the motive is impermissible.

19 Here, if we win our equal protection argument, there is no  
20 basis to deny all of our clients the right to remain here until  
21 the government promulgates a decision free of racial animus.

22 **THE COURT:** All right. Thank you.

23 **MR. ARULANANTHAM:** So I can proceed into the merits of  
24 the equal protection claim, Your Honor, or --

25 **THE COURT:** Well, I've got a couple questions for the

1 government's attorney and then if you want to highlight a  
2 couple points, I'll give you a chance to do that.

3 Mr. Kirschner, there's some reference in the documents --  
4 I think Exhibit 29, 30 -- about the decisions regarding TPS  
5 being consistent with the President's America First policy or  
6 the President's position on immigration.

7 What does that mean? What is America First policy as it  
8 relates to TPS?

9 **MR. KIRSCHNER:** So I would just refer you to just look  
10 at the full context of those documents, and they were kind of  
11 described in the context of the way I believe this is Acting  
12 Secretary Duke is referring to it.

13 But in terms of the merits, she actually in her internal  
14 memo when referring to America First says that termination of  
15 Honduras and El Salvador, I believe is what she's talking  
16 about, could actually hinder our current immigration and drug  
17 enforcement agenda.

18 This is -- Ambassador Nealon in his deposition said that  
19 Acting Secretary Duke was really grappling with this decision  
20 in a good sense of the word. She was a voracious reader and  
21 she was struggling with trying to get to a decision; and when  
22 she refers to America First, it kind of points in both  
23 different directions and it's her kind of working her way  
24 through that.

25 I would kind of let the documents do the talking in terms

1 of how she addresses that, but I think that that kind of  
2 discussion is pointing in various directions. As you can see  
3 in her internal memo, which is really written just for her own  
4 eyes, her struggling at trying to reach a decision here.

5 **THE COURT:** But the sentence that says "This  
6 conclusion is the result of an America First view of the TPS  
7 decision," which follows a paragraph that starts "The TPS  
8 program must end for these countries soon." So the decision  
9 has been made you've got to do it soon. Now, how best to do it  
10 and what time frame, we've got to figure that out because  
11 there's conflicting things, but it suggests that the  
12 America First view is what's driving the conclusion that the  
13 TPS program must end soon.

14 So what is the -- all I'm asking is: What is the  
15 America First policy? How would you -- what are they talking  
16 about?

17 **MR. KIRSCHNER:** Well, I would also point you to the  
18 following paragraph of what you're looking at, I believe, if my  
19 memory serves me correct. If I could get -- look at my --  
20 bring my binder up to point you to the --

21 **THE COURT:** Yeah. That's the one that says the  
22 Department of State recommends that neither El Salvador nor  
23 Honduras have the current capacity to accept and assimilate the  
24 TPS individuals back into the country.

25 **MR. KIRSCHNER:** Well, then it maybe is at the end of

1 the same paragraph you were talking about. The language which  
2 she says that termination could actually hinder our current  
3 immigration and drug enforcement agenda.

4 **THE COURT:** Yeah.

5 **MR. KIRSCHNER:** And so it's that America First for her  
6 is the outlook on the immigration and drug enforcement agenda,  
7 and that she is finding that it kind of points in both  
8 different directions here and that this is with her struggling  
9 to reach a conclusion.

10 **THE COURT:** So I guess my question is: What is she  
11 referring to when she says the America First issues or agenda  
12 or -- what does that refer to?

13 **MR. KIRSCHNER:** I think it's referred to in the  
14 discussion in that -- in the -- in that entire memo, which she  
15 refers -- she kind of describes it herself about migration and  
16 about drug enforcement issues and a general kind of  
17 perspective.

18 And this, again, was her grappling with this decision.  
19 And so not to put words in her mouth, I would really just  
20 suggest that it's in the context of the entire memo as she's  
21 struggling with her decision.

22 **THE COURT:** The other inference, then, I think that  
23 the plaintiffs seek to draw is America First means ending  
24 immigration status for those who are nonwhite. What do you say  
25 to that?

1           **MR. KIRSCHNER:** I would just say -- I would just --  
2 again, Your Honor, look at the full record. I would look at  
3 the full record before you that is Acting Secretary Duke again  
4 grappling with the decision, not just her internal memo, her --  
5 the descriptions of her processes by Ambassador Nealon trying  
6 to get to the right decision, trying to figure out how to make  
7 a decision here.

8           And that -- and that, in fact, plaintiffs do not suggest  
9 that there's animus by Acting Secretary Duke. They try to draw  
10 inferences elsewhere, but I -- again, this was her -- as Chief  
11 of Staff John Kelly referred in a contemporaneous e-mail, that  
12 this was her decision to make; and, of course, she received  
13 input from various sources. She received input from the  
14 National Security Council but didn't accept all the  
15 recommendations from the National Security Council. She's  
16 received input from Ambassador Nealon the other way, did not  
17 accept all the recommendations from Ambassador Nealon.

18           So I think that it just shows an effort of her trying to  
19 grapple, using Ambassador -- I believe that's the word  
20 Ambassador Nealon uses -- grapple with the decision.

21           **THE COURT:** In another memo, this is Exhibit  
22 Number 30, she talks about the no decision -- again we talked  
23 about this before -- for the termination of Nicaragua, the no  
24 decision for six months on Honduras. Let's see (reading):

25           "These decisions, along with public statements, will

1 send a clear signal that TPS in general is coming to a  
2 close. I believe it is consistent with the President's  
3 position on immigration and, under the circumstances, is  
4 the best position to work with Congress," et cetera,  
5 et cetera.

6 So, again, what does that refer to when she refers to the  
7 "President's position on immigration"?

8 **MR. KIRSCHNER:** Again, I refer back to  
9 Ambassador Nealon's deposition where he talks about kind of the  
10 different considerations and domestic policy considerations,  
11 that every Administration comes in with different perspectives  
12 of how to look at these decisions. That's consistent with -- I  
13 believe it's consistent with Director Rodriguez's declaration  
14 as well of how they approach -- his -- his -- under him about  
15 how USCIS approached these questions.

16 And so I think that though documents themselves -- to  
17 point to one document in particular shows a robust record of  
18 Acting Secretary Duke looking from different sources, looking  
19 at -- that internal memo talks about intelligence assessments,  
20 classified information which we redacted, input from a variety  
21 of sources, that was often conflicting perspectives. She did  
22 not seek a monolithic perspective.

23 **THE COURT:** It appears she's keeping in mind the  
24 Administration's view on the America First doctrine and the  
25 President's immigration policy. So this is not just --

1 otherwise she wouldn't have had to state that, I mean, right?

2 **MR. KIRSCHNER:** Well, this is an internal memorandum  
3 to herself as she's trying to struggle through the answer.  
4 It's not that she's stating this for anybody but herself.

5 **THE COURT:** Well, in some ways that makes it even --  
6 I'm not sure which way that cuts. The fact that she's mindful  
7 of the President's policy suggests that there's a degree of  
8 influence coming from the White House on the merits of this TPS  
9 decision.

10 **MR. KIRSCHNER:** And plaintiffs don't suggest that any  
11 previous Administration had input from the White House. They  
12 even acknowledge in their briefs that you would -- that that's  
13 not their argument here. It is that in a decision such as this  
14 one, as we've acknowledged all along, is that you would expect  
15 input from the White House.

16 But what Chief of Staff John Kelly makes very clear is  
17 that, in an internal e-mail within the White House, that his  
18 concern was to ensure that the Acting Secretary made a decision  
19 but the ultimate decision was hers to make, and that is backed  
20 up by the deposition testimony of the different individuals  
21 that plaintiffs have taken.

22 **THE COURT:** Well, certainly technically and by statute  
23 it is hers to make. The question is if there's an allegation  
24 of less than pure motivation on the part of the White House  
25 with respect to immigration policy and TPS in particular and



1 those who are subject to this particular decision who were  
2 characterized as coming from shithole countries, whether that  
3 influenced her in any way, then that may be relevant.

4 I mean, that's what we're talking about; that is, an equal  
5 protection violation can arise not just from the  
6 decision-maker's animus, but if they're influenced by others, I  
7 think it's long-established antidiscrimination law that you  
8 then consider whether that person was influenced by those whose  
9 motives were not so pure.

10 And all I'm suggesting is that here this is certainly an  
11 awareness on Secretary Duke's part, never mind all the other  
12 meetings and the high-level meetings that occurred and contacts  
13 between various officials of the White House and DHS, but just  
14 this fact alone suggests certainly an awareness, if nothing  
15 else, and maybe some concern about consistency with the  
16 President's larger immigration policies and agenda.

17 **MR. KIRSCHNER:** And I think that that's a key  
18 distinction, immigration policy versus something in any other  
19 sense of the context.

20 What I would say is we do know that Acting Secretary Duke  
21 did not accept the recommendations for two of the four  
22 countries as recommended by the National Security Council.

23 And we do know of a contemporaneous e-mail by John Kelly  
24 of the decision-making process about how it's Acting Secretary  
25 Duke's decision to make.

1 And we do know of the deposition testimony of  
2 Ambassador Nealon referring specifically to Acting Secretary  
3 Duke being a voracious reader trying to get input from various  
4 sources.

5 And we do have the memo to file -- the memo, internal  
6 memo, that she writes of her struggling with her decision.

7 But, you know, what I would ultimately say, Your Honor, is  
8 that plaintiffs put out a description of the documents and  
9 evidence, and we've done it as well, in terms of what we think  
10 kind of tells the story, and we really do just rest -- I refer  
11 you back to the briefs because the briefs cite within them the  
12 documents and the exhibits that kind of make out the story that  
13 we think is the apt story in deciding plaintiffs' motion for a  
14 preliminary injunction.

15 **THE COURT:** All right. Let me just ask you the  
16 request for data regarding the crime rate and public relief  
17 claims -- I think it was for Haitian beneficiaries in  
18 particular -- what's the purpose of that?

19 **MR. KIRSCHNER:** So there's two responses, Your Honor.  
20 One is one of the designation criteria -- there's three  
21 designation criteria in the statute. One of them allows you to  
22 take into account the interest of the United States or some  
23 general term along those lines; and one of the exhibits that  
24 plaintiffs cite is one of the career individuals addressing  
25 whether to include that discussion in the Federal Register

1 notice.

2 And this goes to my second point, is that that was not  
3 ultimately relied upon in the decision to extend Haiti by six  
4 months, because this goes to the decision to extend Haiti by  
5 six months, and acknowledges -- that career person acknowledges  
6 that that would go to that element of the statute.

7 But I think a larger point is that this goes to a  
8 different decision than what is at issue in this case. That  
9 was that the timing of that request is in the spring of 2017  
10 when Haiti was extended by six months by Secretary Kelly, and  
11 we are looking today at the decision to terminate Haiti,  
12 amongst others, by Acting Secretary Duke.

13 **THE COURT:** All right. Let me hear the response.

14 Anything you might want to add?

15 **MR. ARULANANTHAM:** Yes, Your Honor.

16 As to what America First means, I think it's quite clear  
17 what America First means. As Your Honor had said, there's a  
18 mountain of statements and it's striking to me that the  
19 government has said nothing, and they had extra pages in their  
20 brief. They don't make any attempt to explain all of these  
21 horrific statements.

22 As to specifically the connection between those statements  
23 and TPS holders -- Your Honor referred to the S-hole countries  
24 comment, which is in a conversation about TPS -- we have more  
25 now from discovery on this subject. Robert Law, who in

1 Slide 9, is described. He's the senior adviser to Kathy  
2 Kovarik who is the person who is brought in from the Trump  
3 transition team. So she volunteered for the Trump transition  
4 team after obviously hearing all of the President's statements  
5 on the campaign trail. She coordinates the TPS review process  
6 and collects all this information. She hires as her senior  
7 adviser Robert Law. Robert Law came into that position from  
8 being the government relations director at Federation for  
9 American Immigration Reform.

10 And at Exhibit 23, it's page 15, it's right at the bottom  
11 of that, you can see he wrote a memo to the Trump transition  
12 team asking for a number of extremely restrictive immigration  
13 policy changes, one of which was to end TPS for any country  
14 that had had it for more than two extensions.

15 So there is an incredibly tight nexus between the  
16 President's animus and people who joined up with the  
17 Administration in order to implement the President's  
18 immigration policy, which flows directly out of that animus,  
19 and the particular decisions on TPS that we're challenging in  
20 this case.

21 And I have to say, Your Honor, I've read a number now of  
22 *Arlington Heights* cases. People win *Arlington Heights* cases  
23 with no statements. They win *Arlington Heights* cases with no  
24 direct evidence about the decision-maker's motivation. In some  
25 cases it's impossible even to have direct evidence of the

1 decision-maker's motivation because the decision-maker is a  
2 legislature or a City Council.

3 I have not seen an *Arlington Heights* case with evidence as  
4 strong as what we have here both on the question of whether the  
5 supporters or, you know, on the catspaw theory, those people  
6 have animus and on the question of whether that animus actually  
7 influenced the decisions of the people who were the actual  
8 decision-makers.

9 I mean, for one thing, as Your Honor had suggested in the  
10 motion to dismiss order, this is not like the catspaw. This is  
11 like saber-tooth tiger paw or something; right? This is the  
12 President of the United States, the most powerful person in our  
13 government. There's repeated statements from him.

14 Then you have these conversations that we are sort of  
15 debating over how to interpret about coming from  
16 Secretary Kelly, these e-mail conversations. Excuse me. At  
17 this point he's the Chief of Staff Kelly so he's, you know, the  
18 President's right-hand person in this context.

19 If you look at, for example, the exhibit that the  
20 government was relying on about this e-mail exchange where, you  
21 know, he says she's wrestling with the decision, where Acting  
22 Secretary Duke is wrestling with it, in her e-mail exchange  
23 with Secretary Kelly on this -- this is Exhibit 135, I think,  
24 is where the whole context of that is -- she's defending the  
25 information that he had gotten on her suggesting that she

1 wasn't in line with White House policy. And what she says is  
2 (reading):

3 "The internal controversy was at least in part because  
4 there was a White House strategy that DHS and me, as the  
5 decision-maker, wasn't informed of and that's why I had  
6 done" whatever it is that she's talking about.

7 But what that statement proves, Your Honor, is that her  
8 decision-making is being altered in part because of what a  
9 White House strategy is. And we don't have to prove under  
10 *Arlington Heights* that the sole reason for the decision was  
11 racial animus. We don't even have to prove that the primary  
12 reason was racial animus. We have to prove it was a motivating  
13 factor, and here she is saying that it's a motivating factor.

14 **THE COURT:** I have a Degen supplemental declaration,  
15 and 135 seems to be a different document.

16 **MR. ARULANANTHAM:** Let me -- give me one moment and  
17 see if I'm making a mistake.

18 (Pause in proceedings.)

19 **MR. ARULANANTHAM:** Your Honor, if I can give it to  
20 your courtroom deputy.

21 **THE COURT:** Okay.

22 **MR. ARULANANTHAM:** And this is the first page of it  
23 for context.

24 Robert Law, by the way, Your Honor, is the person who said  
25 about the Haiti decision (reading):

1           "The draft is overwhelmingly weighted for extension,  
2           which I do not think is the conclusion we are looking  
3           for."

4           You know, that was right after he came into the government  
5           and he got involved in TPS decision-making right away.

6           Courts normally look at a bunch of other factors because  
7           they don't have direct evidence of the decision-maker's motive.  
8           So you would look, for example, at the fact -- the government  
9           doesn't ever contest this -- that now 98 percent of the people  
10          who had TPS, at the time the Trump Administration had it, now  
11          no longer have it. It's our four countries plus Honduras and  
12          Nepal. If you add them up, it's now 98 percent of people. So  
13          the Administration has done what they sought to do, which is --

14          **THE COURT:** In other words, the remaining countries  
15          still on TPS status only represent 2 percent?

16          **MR. ARULANANTHAM:** 2 percent. If you look at  
17          Exhibit 14, at the back of it there's a chart with all the  
18          numbers, the population breakdowns, there. Unfortunately we  
19          didn't put the math in the brief, though, so you can -- it  
20          actually doesn't even include Sudan because at the time that  
21          that tab was written, Sudan had already been terminated. But,  
22          yes, it's 98 percent of the people have lost it.

23          And there's just a lot of other evidence. Exhibit 14,  
24          that same tab, which showed the numbers, that was a tab to a  
25          discussion paper that had been circulated for a White House

1 principals-only meeting that was held on November 3rd, just  
2 days before the decision deadline for -- what the  
3 Administration wanted was for there to be an announcement that  
4 they were ending for Nicaragua, El Salvador, Haiti, and  
5 Honduras all at the same time.

6 And the White House passes out a discussion memo which  
7 says we should end TPS for all of these countries, basically so  
8 we can use it as a bargaining chip in creating a merit-based  
9 immigration system that most of these people would be left out  
10 of but then, you know, now we'll have leverage to negotiate  
11 over it. That's what the White House is saying.

12 Now, she doesn't follow exactly -- as government counsel  
13 said, she doesn't do exactly what they say. She ends it for  
14 Nicaragua, ends it for Haiti, and then waits a little while so  
15 that El Salvador gets ended two months later, and, you know,  
16 her successor does that and ends Honduras. But that doesn't  
17 prove that it wasn't a motivating factor in the decision. It  
18 proves it obviously was a motivating factor in the decision.

19 **THE COURT:** Well, what was a motivating factor? The  
20 decision to end TPS generally?

21 **MR. ARULANANTHAM:** Yes, Your Honor.

22 **THE COURT:** Okay. That alone -- you're not saying  
23 that that itself is an unlawful motive that violates equal  
24 protection because yours is a much more specific. It's a  
25 race-based --



1           **MR. ARULANANTHAM:** That's right, Your Honor.

2           **THE COURT:** -- argument, which is the same question I  
3 have about Mr. Law's past relationship with FAIR. In reading  
4 the materials, it's evident that they have a very restrictive  
5 view on immigration, but you have to make an inference to say,  
6 "Well, that is an anti, nonwhite, race-based animus." And so  
7 that's going a step further.

8           **MR. ARULANANTHAM:** Yes. This is a very important  
9 question, Your Honor.

10           It is definitely possible to be -- to favor immigration  
11 restriction and not to be racially -- motivated by racial  
12 animus. The government hasn't made this argument but I think  
13 it's a fair question that we have to address.

14           And the first thing is you have to look at the context of  
15 the statements -- the context in which these decisions are  
16 made, and in particular the statements of the President. The  
17 President is providing context for why he advances this  
18 restriction, this immigration agenda, through this constant  
19 stream. I won't repeat them again but just a persistent  
20 stream.

21           **THE COURT:** All right. So, in addition, anything  
22 other than the President's statements, which do contain --  
23 arguably can be interpreted as being correlated with racial  
24 views --

25           **MR. ARULANANTHAM:** Yes, Your Honor.

1           **THE COURT:** -- what else do we have to suggest this?

2           **MR. ARULANANTHAM:** Yes, Your Honor. So, one, if this  
3 was really about the reasons for restricting immigration that  
4 are sort of acceptable reasons -- or I shouldn't say -- that  
5 are nonrace-based reasons, that are often in the rhetoric, then  
6 you would see that targeted at people who have criminal  
7 convictions, people who are law breakers by virtue of being  
8 undocumented.

9           I think that's one reason which makes our case  
10 particularly strong on this point. It's a group of people who  
11 by definition are lawfully present -- and many of them for more  
12 than a decade, some almost 20 years, in some cases more than 20  
13 years -- and by definition don't have a criminal conviction  
14 other than I think it's a misdemeanor. I can't remember the  
15 exact rule, but you're ineligible for TPS if you have anything  
16 more than an extremely minor conviction.

17           And so the fact that they've chosen to target about  
18 400,000 people who are lawfully present in this country without  
19 a significant criminal history is irrelevant to the question of  
20 what is the motive underlying the government's behavior.

21           **THE COURT:** And if the motive, as indicated by some of  
22 these memos, is to move to a so-called merits-based immigration  
23 policy, would that be unconstitutional?

24           **MR. ARULANANTHAM:** Certainly not in and of itself, but  
25 I think -- well, here, I'd point the Court to *McCrary*, which is

1 the North Carolina voting rights case. And there there's an  
2 adoption of a whole set of voting scheme rules that make it  
3 much harder for African Americans to vote, and the state's  
4 argument essentially is what Your Honor is suggesting, "We just  
5 don't want Democrats to vote," and it just so happens that the  
6 Democrats are -- or African Americans are overwhelmingly  
7 democratic.

8 And what the court says is that may be your ulterior  
9 motive, but if you are targeting people on the basis of their  
10 race, then you are violating the equal protection clause. And  
11 it is often true that you can have the same policy -- this is I  
12 think hornbook equal protection doctrine in this area of law --  
13 you can have the same policy that would be permissible if it  
14 were one motive and impermissible if it were the other motive.

15 So what the Court has to look for yourself and ask is:  
16 Does the totality of this record here show that a motivating  
17 factor -- a motivating factor in these decisions is the racial  
18 animus of the President?

19 And, as I said, you look at the other cases where they  
20 find race is a motivating factor, many of the statements  
21 have -- many of the cases have no statements. In *McCrary*  
22 there's not a single statement in the record, at least that the  
23 court identifies, that invokes any kind of negative statement  
24 toward African Americans. It's done entirely on the basis of  
25 the impact, disparate impact, and the departure from the normal

1 procedural sequence and normal substantive rules.

2 Look at *Avenue 6E*, the Ninth Circuit's case. They're  
3 speaking in code and they say, "We don't -- we're worried about  
4 people with large households or people who park their cars, you  
5 know, in the yard." We don't have code in this case. We just  
6 have blatant rank discrimination animus statements coming from  
7 the most powerful person in the government coupled with we know  
8 massive deviations from the normal way things operated even  
9 under --

10 **THE COURT:** So if you rely on the statements as  
11 showing that the real motivation here or a real motivation here  
12 is not general immigration policy restrictions or going to  
13 merit-based for race-neutral reasons but really motivated in  
14 the ultimate analysis by racial animus or stereotyping, what  
15 does that suggest in terms of any future action?

16 If you were to prevail in this case, would that prevent  
17 DHS from going back and revising the rules, let's say make  
18 explicit reliance on only originating conditions and then  
19 trying to justify that somehow or going back and considering  
20 those conditions but then reaching the same decision? Would  
21 everything be -- when does the taint end?

22 **MR. ARULANANTHAM:** Well, there's two slightly  
23 different questions there. On the question of when the taint  
24 ends at all, I think the taint ends when there are steps that  
25 are taken to counteract it.

1        So on the question of whether the government will be able  
2 to say at some point "The President's racial animus has no role  
3 in this decision," that's not going to change until the  
4 President stops making these deeply racist statements. And  
5 some of them, like "the undocumented people are animals," that  
6 "people -- migrants to Europe, who are mostly from the Middle  
7 East, are changing the fabric of European culture," those came  
8 even after we filed I think the opening brief -- or after we  
9 filed -- after we litigated the motion to dismiss.

10        So as to any taint at all, there's not going to be a  
11 change until the Administration or the President stops  
12 denigrating our clients and large numbers of other immigrants.

13        But that doesn't mean that it's a motivating factor. Just  
14 because -- that's one factor and under *Arlington Heights*,  
15 there's a rich set of evidence that the Court is entitled to  
16 look at.

17        For example, if when they went back the country conditions  
18 career people wrote -- instead of saying, "Well, under all the  
19 standard metrics, TPS should be continued, the problem is the  
20 conditions on the ground are that bad," if instead they said,  
21 "We don't think that extension is required here because the  
22 Sudanese Civil War has dramatically improved," or things like  
23 that, then that's, you know, relevant evidence. Even if the  
24 President is still, you know, making his racist statements,  
25 that's relevant evidence that it's not a motivating factor in

1 the decision at this point.

2 In addition, Your Honor, and I think this is a reason why  
3 the equal protection claim is especially easy for us to win in  
4 the TPS context compared to a bunch of other immigration  
5 policy -- it's not an accident that we haven't brought equal  
6 protection challenges against so many things that the  
7 Administration has done in the immigration courts -- asylum  
8 policy, all kinds of things -- because where the government has  
9 more discretion and the statutory criteria are not so narrow  
10 and fixed by Congress, it's much harder to ascertain whether  
11 the influence that's operating is somehow impermissible.

12 In contrast here -- and I really disagree with the  
13 government counsel on this subject -- while the Secretary has  
14 discretion to initially designate, once the designation has  
15 happened, the Secretary must continue if the conditions warrant  
16 an extension. That's what the statute says.

17 And, therefore, it's very easy to figure out in this  
18 context, compared to others, whether the motivation that's  
19 underlying the decision-making is permissible or impermissible.  
20 So here if the country conditions experts say that TPS should  
21 be terminated, then it's easy to figure out.

22 That's not to say, Your Honor, that the Secretary  
23 obviously does still have discretion -- sorry. Let me rephrase  
24 that.

25 The Secretary does still have some discretion in making

1 the country conditions assessment; right? But you can see from  
2 these e-mails and from the phone calls and the White House  
3 meetings and Secretary Kelly calling from Asia to pressure this  
4 decision, this is not about disagreement over the country  
5 conditions. This is about driving the President's  
6 anti-immigrant agenda. That's clearly what this evidence  
7 overwhelmingly shows.

8 The last point I want to make on this subject before I  
9 answer any further questions Your Honor has, *Trump* -- you had  
10 asked earlier, well, should we be governing -- should we be  
11 applying *Trump* here rather than *Arlington Heights*, and I think  
12 for all the reasons Your Honor had said previously and as I  
13 discussed earlier today, the answer is *Arlington Heights*.

14 But even if we were in the *Trump v. Hawaii* world, because  
15 of the discovery that we have gotten in this case, we can  
16 prevail in showing that the decision that the government made  
17 here was not *bone fide*. Even under *Kleindienst* and under  
18 *Trump*, we can show that the reason that was proffered by the  
19 government is not the real reason why these decisions were  
20 made.

21 And we can make that showing and because, as you discussed  
22 with my co-counsel and is illustrated more in the country  
23 slides, it's, like, Slide 10 -- I have one for each country,  
24 Slide 10, 11, 12, 13 -- you can see what the country conditions  
25 experts, the objective country conditions experts, wanted to do

1 after they had objectively analyzed the country conditions in  
2 each of our four countries because they say, "Well, the  
3 conditions on the ground warrant TPS continuing," for each of  
4 them. The RAIIO reports show it in some cases. In some cases  
5 it's the Diplomatic Mission. That's the U.S. Embassy in Haiti  
6 and in El Salvador. They're on the ground, they know what's  
7 happening, and they're describing in their letters what is  
8 happening.

9 So we actually have a very unusual set of evidence here  
10 because we have predecisional material. And the Supreme Court  
11 in *Trump* specifically noted the absence of predecisional  
12 materials in that case, that "We don't have predecisional  
13 materials. We knew that there was this 17-page memo that had  
14 apparently analyzed the travel ban worldwide, but the court  
15 didn't have it and the plaintiffs didn't have it."

16 But here we have it, and we know that if you took out the  
17 political motivation, you took out the racist motivation  
18 driving the President's immigration agenda, the result would be  
19 that they would have continued TPS for all of these four  
20 countries because that's what the people who were analyzing the  
21 conditions on the ground actually wanted.

22 And it's only then when the people from the Trump  
23 transition team who had come into DHS got involved, that they  
24 rewrote the memos, changed, you know, "disastrous" to  
25 "challenges," or whatever other rhetorical moves that they made



1 were, and, you know, altered the conclusions that the objective  
2 decision-makers had made.

3       So I think the analogy is to imagine what if we had in  
4 *Trump* gotten the first draft of this country analysis, you  
5 know, for the travel ban and what if that first draft said,  
6 "Oh, the countries that have the biggest problems when it comes  
7 to vetting their nationals are Mongolia and Uganda and, I don't  
8 know, some other country," and then the Trump Administration  
9 people had come in and said, "No, that's not the conclusion  
10 we're looking for so let's rewrite this, let's rewrite that,  
11 and change it to, you know, the countries that were part of the  
12 ban." I think in that situation the Supreme Court would have  
13 been -- found that even under *Trump*, you have not presented a  
14 *bone fide* reason because we know what the reasons are and  
15 actually they're not the ones that you have put forward.

16       So I think I'm very confident that *Arlington Heights* is  
17 what governs this case, but the very unusual record we have  
18 here is strong enough to win even under *Trump* because we  
19 actually have this counterfactual evidence which courts almost  
20 never get.

21       **THE COURT:** When the *Trump* decision, *Hawaii versus*  
22 *Trump* decision, says "The standard of review considers whether  
23 the entry policy," which is at issue there, "is plausibly  
24 related to the government's stated objective," does the court  
25 engage -- is plausibly just a standard of review and you still

1 have to make the determination what was the true motivating  
2 factor, or is this more like any conceivable justification test  
3 of the old brand of equal protection?

4 **MR. ARULANANTHAM:** I think it's the former because  
5 they're speaking in the context where you don't know the  
6 underlying motivation. In most of these cases you won't get to  
7 the discovery. Like, if we knew in advance that this were the  
8 standard, then it would be hard in some cases to get the  
9 underlying evidence of what the actual motive is.

10 But I think "plausibly related" means that -- I mean, it  
11 must mean -- "plausibly related" must mean if I can show you  
12 objectively that that's not the reason, then it's not --

13 **THE COURT:** Then it's not plausible.

14 **MR. ARULANANTHAM:** Yeah, then it's not plausible.

15 **THE COURT:** In light of the evidence.

16 **MR. ARULANANTHAM:** Exactly.

17 **THE COURT:** So it is an evidence-based analysis; it's  
18 just the standard is very low.

19 **MR. ARULANANTHAM:** It is, Your Honor. If you look at  
20 the facially legitimate and *bone fide* cases that the lower  
21 courts -- when the lower courts apply facially legitimate and  
22 *bone fide* -- and, again, here we're outside the briefing for  
23 which I apologize, but there's a Tenth Circuit case. It's  
24 *Marczak v. Greene*, which is an application -- M-A-R-C-Z-A-K v.  
25 Greene -- it's an application of the facially legitimate and

1 *bone fide* standard in the parole context in domestic  
2 immigration law. This is people being released from the border  
3 to come into the United States. And in that context the court  
4 reviews a number of cases and says, "You do do some evidentiary  
5 review even in this context to see whether there's some basis  
6 for the underlying rationale that's been proffered."

7 There's a Ninth Circuit case on that subject as well  
8 where -- it's *Nadarajah* -- N-A-D-A-R-A-J-A-H --

9 **THE COURT:** Sorry. What's that?

10 **MR. ARULANANTHAM:** N-A-D-A-R-A-J-A-H, *Nadarajah*.

11 And these are just lower courts applying facially  
12 legitimate and *bone fide* review, and they're doing some amount  
13 of evidentiary assessment.

14 I read even the Supreme Court's decision to do some amount  
15 of evidentiary assessment. The court has this discussion about  
16 the waiver policy and whether the waiver policy is real or, you  
17 know, only kind of for show. They wouldn't be doing any of  
18 that if you didn't have to make some evidentiary assessment in  
19 deciding whether the justification was even plausible. So  
20 definitely there is some looking beneath that goes on  
21 underneath that standard.

22 Now, I imagine that not in every case will you get the  
23 predecisional information actually handed to you because a lot  
24 of them involve national security, which is what happened in  
25 *Trump v. Hawaii*. Our case doesn't have any national security

1 considerations in it, and so we were able to get -- or if there  
2 is a national security consideration, it cuts in our favor when  
3 you have people like SOUTHCOM saying "You should not end TPS  
4 for these countries." But we were able to get that information  
5 and so we actually know what the underlying decisions would  
6 have been if you didn't have this political interference going  
7 on in the decision-making process.

8 **THE COURT:** All right. Let me give the government a  
9 chance to respond to the last question, which I think is really  
10 central to the analysis. Assuming for the moment that we are  
11 under a *Trump* rational basis review and not the more searching  
12 scrutiny of *Arlington Heights*, do you agree that whether the  
13 challenged policy is, quote, "plausibly related to a legitimate  
14 purpose" or, quote, "can be understood to result from a  
15 justification independent of unconstitutional grounds," is that  
16 an evidence-based analysis?

17 **MR. KIRSCHNER:** I guess I'm a little confused with the  
18 question. When you say "evidence-based analysis," compared  
19 versus --

20 **THE COURT:** Well, there's the old branch of an equal  
21 protection law that even a court, if you can conceive of any  
22 reasonable basis, even if it was never argued by the  
23 government, even if there's no evidence, even if the Court  
24 conceives of it, you uphold it. There's *Leon versus Williams*,  
25 there's a whole line of cases.

1 And then there's the more modern cases that say, no, it's  
2 a rational basis but we're going to look and see what's the  
3 motivating -- what could have been the motivation of the voters  
4 in Colorado, for instance.

5 So what branch is this? When it says "plausibly related  
6 reasonably can be understood," does that mean in light of the  
7 facts it can be plausibly related to an independent purpose or  
8 is this something that's anything conceivable?

9 **MR. KIRSCHNER:** Well, a couple things. One,  
10 Your Honor, is that in that decision they analogize rational  
11 basis so I think it's pulled from the rational-basis line of  
12 reasoning.

13 The other thing I would say is that we contend that this  
14 would be a record review case even on equal protection grounds.  
15 And so it's the rationale as explained by the government and  
16 the assessment of that of whether it's the plausibly stated  
17 objective. So I would say you would look at the -- dig  
18 somewhere into the merits of it to the stated rationale by the  
19 government.

20 **THE COURT:** So your position is that the Court cannot  
21 look beneath the stated rationale, it cannot look to the  
22 underlying documents that weren't public? Or what's your  
23 position on that?

24 **MR. KIRSCHNER:** Well, Your Honor, I think that it is  
25 again a record review, administrative record review, and so

1 the -- so the administrative records are -- include materials  
2 that are not public *per se* but they do not include in the  
3 normal course deliberative materials.

4 **THE COURT:** So some of the memos we've been talking  
5 about would not be included in the administrative record here?

6 **MR. KIRSCHNER:** And for your benefit, we have -- we  
7 have a certified administrative record so you could see the  
8 record that we have relied upon. And we filed each of those  
9 administrative records with the court.

10 **THE COURT:** All right. Your position is that even on  
11 a constitutional claim that is being asserted independent of  
12 the APA claim, that the court should be restricted to the  
13 administrative record?

14 **MR. KIRSCHNER:** And 706(a)(2) refers to constitutional  
15 claims.

16 **THE COURT:** All right. I will take the matter under  
17 submission. This has been helpful. I understand the urgency  
18 of resolving at least this motion. I suspect that however it  
19 is resolved, appellate relief will be sought so I'm aware of  
20 that and the timeline so I'm going to try to get to this as  
21 soon as possible.

22 I appreciate the arguments. It was very helpful. Thank  
23 you.

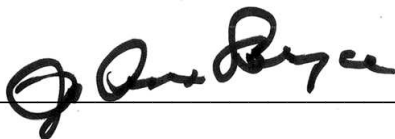
24 (Proceedings adjourned at 12:52 p.m.)

25 ---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Friday, September 28, 2018

A handwritten signature in black ink, appearing to read "Jo Ann Bryce", is written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
U.S. Court Reporter